84-1057

Office - Supreme Court, U.S.
FILED
DEC 29 1984
ALEXANDER L. STEVAS
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

OPHUS A. HUTCHERSON, JR.
W. H. HOUSEMAN
A. W. LYNCH
BRUCE HIGGINS
O. K. TENCH
KENNETH D. CAMPBELL
ALLEN PERDUE
JAMES BOUSEMAN
JACKSON JEWELL
J. CARL POINDEXTER

and

A. DALE BROWN
RICHARD O. ANGLE
HAROLD E. PALMER
PAUL SMITH
JOSEPH FORDHAM
ROGER FLOWERS
DICK ROBERTSON

Petitioners,

v.

BOARD OF SUPERVISORS OF
FRANKLIN COUNTY, VIRGINIA:
TOWN OF ROCKY MOUNT, VIRGINIA

Respondents

# PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH JUDICIAL CIRCUIT

JOHN H. KENNETT, JR.
133 Kirk Avenue, S. W.
Roanoke, Virginia 24011
Telephone: (703) 345-0946

Counsel for Petitioners

## QUESTIONS PRESENTED

1. There being no unambiguous Virginia remedial law or apposite court precedent pursuant to which the class plaintiffs may seek, by state court mandate, the uniform assessment and collection of a Franklin County school-financing tax from which a substantial segment of the plantiffs' class of benefited taxpayers are exempted by state law, did the District and the Appeals Courts below erroneously deny District Court jurisdiction over plaintiffs' grievance on the assigned ground that they have a "plain, speedy and efficient remedy in the courts of the State"?

2. In relying on the rulings of the Fifth Circuit Court of Appeals upholding district court jurisdiction over civil rights (#42 U.S.C. 1983) suits to mandate the "assessment, levy or collection" of certain state taxes characterized by disuniform, inequitable and

constitutionally objectionable exemptions (i.e., the opposite of suits to "enjoin, restrain, or suspend the assessment levy or collection" of such taxes), were the plaintiffs herein guilty nonetheless of filing a "frivolous" suit in the Fourth Circuit merely because they asked the District Court therein to hear and remedy precisely the same kind of complaint upheld by the courts of the Fifth Circuit?

3. The plaintiffs' suit having been dismissed for lack of jurisdiction of the District Court and also, for this reason alone, pronounced by the Court to be "frivolous", in the teeth of the Fifth Circuit's rulings to the contrary import and upon which the plaintiffs relied, are the governmental defendants herein nonetheless "entitled" to exact their defense counsels' fees ($5,511) from not their licensed professional lawyer-"officer of the court" but instead from the bona fide plaintiffs in this "private attorneys general"type of class action suit?

4. Has not Congress exceeded its federal constitutional authority in enacting The Civil Rights Attorney's Fees Awards Act (42 USS.C 1988) in so far as it purports to confer the "chilling" repressive governmental power on municipalities of Virginia -- a power denied to them by the state's own constitution and laws -- to exact damages in the guise of their defense attorneys' wages and fees from their bona fide civil rights complainants herein merely because their lawyer mistakenly filed their civil rights suit in the United States District Court of the Fourth Circuit instead of a state court therein?

TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . . i

TABLE OF CONTENTS . . . . . iv

TABLE OF AUTHORITIES . . . . . v

OPINIONS BELOW . . . . . 1

JURISDICTION . . . . . 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED . . . . . 3

I. STATEMENT OF THE CASE . . . . . 3

II. REASONS FOR GRANTING CERTIORARI . . 8

III. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT MISCONSTRUED AND MISAPPEALED BY THE LOWER COURTS . . . . . 23

IV. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT AS APPLIED, RAISES A QUESTION OF ITS CONSTITUTIONALITY . . . . . 28

V. CONCLUSION . . . . . 39

APPENDIX . . . . . A-1

TABLE OF AUTHORITIES


California v. Grace Brethren Church 457 U.S. 393, 73 L. Ed. 2d 93, 102 S. Ct. 2498 . . . . . 14

Chesapeake and Potomac Telephone Company of Virginia v. City of Newport News, 194 Va. 409, 73 S.E. 2d 394 (1952) . . . . . A-9

City of Alexandria v. Richmond, Fredericksburg and P.R.R., 223 Va. 293, 288 S.E. 2d 457 . . . . . 16

City of Staunton v. Mary Baldwin Seminary, 39 S.E. 596 Va. (1901) . . . 16

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed 2d 648 . . . . . 24

Commonwealth v. Tredegar Co., 122 Va. 506, 95 S.E. 279 (1918) . . . . 16

Erie Railway Co. v. Thompkins, 304 U.S. 64, 58 Sup. Ct. 817, 82 L. Ed 2d 1188 (1938) . . . . . 32

Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100, 70 L. Ed. 2d 271, 102 S. Ct. 177 (1982) . . . . . 14

Fulton Market Cold Storage Co. v. Cullerton, 582 F 2d 1071 (1978) . . . . 12

Moten, et al v. A. C. Lambert, et al, 506 F Supp 367 (1981) . . . . . 10

Rosewell V. LaSalle National Bank,
450 U.S. 503, 527, 67 L. Ed. 2d
464, 101 S. Ct. 1221 (1981) . . . . . 14

Strescon Industries v. Cohen, 604 F
2d 929, 951, 5th Cir. (1981) . . . . 18

## CONSTITUTIONAL PROVISIONS

U. S. Constitution, Amendment I . . . . . A-29

U. S. Constitution, Amendment V . . . . . A-29

U. S. Constitution, Amendment X . . . . . A-29

U. S. Constitution, Amendment XIV . . . . A-29

## STATUTES INVOLVED

28 U.S.C. 1331 . . . . . A-30

28 U.S.C. 1331 . . . . . A-30

28 U.S.C. 2403(a) . . . . . A-30

42 U.S.C. 1983 . . . . . A-30

42 U.S.C. 1988 . . . . . A-30

56-617.2, Code of Virginia . . . . . A-30

58-1145, Code of Virginia . . . . . A-30

## OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported as Ophus A. Hutcherson, Jr. et al, v. Board of Supervisors of Franklin County, Virginia, et al, No. 82-2109 (4th Cir. August 23, 1984), and is set out in the Appendix at A-2. The Fourth Circuit's denial of the petitioners' motion for rehearing was issued on October 1, 1984, and is duplicated in the Appendix at A-13.

The Order of the District Court for the Western District of Virginia dismissing plaintiffs' complaint on the assigned ground of lack of jurisdiction was entered on November 29, 1982, and is replicated in the Appendix at page A-27. The Memorandum Opinion and Order of the Court taxing the defendants' attorneys' fees to the plaintiffs was entered on January 10, 1983, and is set out in the Appendix at page A-15.

The District Court's denial of plaintiffs' Motion for Reconsideration of the Court's Order of January 10, 1983 awarding attorneys' fees is replicated in the Appendix at page A-21.

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 2101(c).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal is based on the First, Fifth, Tenth and Fourteenth Amendments of the United States Constitution, and 42 U.S.C. 1983. Other statutes involved are U.S.C. 1341, 42 U.S.C. 1988, 58-617.2 and 58-1145 of the Code of Virginia of 1950 as amended.

The jurisdiction of the District Court for the Western District of Virginia was invoked pursuant to 28 U.S.C. 1331.

The relevant provisions of these amendments and statutory provisions are set forth in the Appendix beginning at page A-29.

## I. STATEMENT OF THE CASE

To pay for a substantial boost of county teachers' salaries. the Franklin County Board of Supervisors adopted a 20% utility tax, July 1980, effective August 1, 1980, as authorized by state law which inter alia, in

#56.617.2 of the Code of Virginia, provides that:

> Any county (utility) tax imposed hereunder shall not apply within the limits of any incorporated town located within such county which town now or hereafter imposes a town tax on consumers of utility services ..., provided that such town (1) provides police or fire protection, and water or sewer services ...

The defendant Town of Rocky Mount, having adopted a 10% utility tax some time previously, the town's residential beneficiaries of the county's schools are exempt from the duty to pay the county's 20% school-financing utility tax, in accordance with the provision of the state statute quoted above.

Plaintiffs filed their class action petition for declaratory judgment and injunctive relief in the United States District Court at Roanoke on May 25, 1982, naming the Board of Supervisors of Franklin County and the Town of Rocky Mount, Virginia, as defendants. The Plaintiffs asked for declaratory judgment that #58-617.2 of the Code of Virginia

is unconstitutional in that it authorizes the exemption of the residents of the town from the duty to pay the utility tax levied by the county to finance a substantial boost of the salaries of the teachers of the county's schools used in common by both town and non-town citizens of the county.

They asked that the court order the extension of the county's utility tax to and the collection of it from the inhabitants of the town on the same basis as it applies to the inhabitants of the county at large (plaintiffs' class) or abate or remove the tax as then applied.

On June 10, 1982, and June 14, 1982, the defendants, town and board of supervisors, moved the court to dismiss on the ground that the Tax Injunction Act, 28 U.S.C. 1341, precluded the court's jurisdiction over plaintiffs' grievance.

On July 29, plaintiffs moved the court for leave to amend; leave was granted, and

plaintiffs filed their Amended Petition for Declaratory Judgment, Damages and Injunctive Relief. Hearing on the defendants' motions to dismiss was set for and held on September 29, 1982.

In their amended petition, the plaintiffs dropped their original prayer that the county utility tax be abated or removed if it not be extended to the county citizens resident in the defendant town, and they added their claim for compensatory damages, plus 100% more in punitive damages from the county board of supervisors, for trespasses on the civil rights of the plaintiffs. After the filing of memoranda of law by the parties, the court, on November 3, 1982, issued its order dismissing plaintiffs' complaint. (Duplicated in the Appendix at page A-27.

Thereupon the defendants filed motions based on #42 U.S.C. 1988, for award of attorneys' fees at the plaintiffs' expense.

After the parties filed memoranda of law on this issue, the court entered its Memorandum Opinion and Order on January 10, 1983, "finding" "as a matter of fact and law that the plaintiffs' action was frivolous." The court said:

> Any fair reading of the statute (28 U.S.C. 1314) and the Supreme Court cases interpreting it clearly instructs that a United States District Court may not entertain an action which in any way challenges the state's levying and collecting of taxes where the state provides a speedy and efficient procedure for challenging such actions. Virginia clearly provides such a procedure. Accordingly, I find that the Defendants are entitled to attorneys' fees ..." at plaintiffs' expense. Appendix page A-17.

From the District Court's Memorandum Opinion and Order, the plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit, from whose adverse ruling of October 1, 1984, they hereby appeal to this Court.

## II. REASONS FOR GRANTING CERTIORARI

The District Court erred in dismissing plaintiffs' complaint on the assigned ground that the Tax Anti-Injunction Act bars the Court's jurisdiction over plaintiffs' cause of action.

The Tax Injunction Act, 28 U.S.C. 1341, provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. (emphasis added)

Contrary to the defendants' claim, plaintiffs are not asking the Court to "enjoin, suspend or restrain" the assessment or collection of any tax. Quite the contrary, they are asking the court to order the assessment and collection of a tax, i.e., Franklin County's school-supporting utility tax uniformly from all taxable county beneficiaries of the county's public schools in redress of the discriminatorily disuniform, unequal and

"invidious" burden now imposed on plaintiffs' class of county taxpayers vis-a-vis those of the Town of Rocky Mount who are exempted from the county's school-supporting utility tax under Virginia Code Section 58-617.2, cit. supra.

No case has been cited upholding the reverse interpretation of #1341 as espoused by the courts below in this case. The reason is that nowhere in any federal court case, with facts like those in this plaintiffs' case, is there to be found any such reverse interpretation as that given to #1341 by the defendants and the courts in this case.

In categorical contradiction of the defendants' and the lower courts' interpretation of #1341, several cases have been decided in the Fifth Circuit which pointedly uphold plaintiffs' interpretation:

> It has long been established by the Fifth Circuit, however, that #1341

> does not apply to suits wherein the requested remedy is the collection of additional taxes and not the enjoining or suspension of taxes. See Hargrave v. McKinney, 413 F 2d 320 (f Cir. 1969; Bland v. McMann, 463 F. 2d 21 5 Cir. 1972); Appling County v. Municipal Electric Authority of Georgia, 621 F 2d 1301, 1304 (5 Cir. 1980). Since plaintiffs demand that taxes be collected and not enjoined, it is quite clear that #1341 does not operate to bar this action." Moten, et al v. A. C. Lambert et al. 508 F Supp 367 (1981).

Plaintiffs find no apposite authority or reason why the Fifth Circuit's interpretation of #1341, as summed up in Moten, supra, should not be presumed to be the relevant jurisdictional law of the land until the Supreme Court at some future time perchance overrules the Fifth Circuit in a case presenting the same issues of fact and law presented in Moten, and likewise in this case of the plaintiffs.

The justification articulated by the Supreme Court for "drastically" restricting

the jurisdiction of the district courts over state tax suits under #1341 rests on concern for the adequacy and reliability of the tax revenues essential to the efficient administration of the public functions of the states and their localities. Plaintiffs assert no objection to this rationale of the limitation on the district court's jurisdiction to "enjoin, suspend or restrain the assessment, levy or collection" of taxes pursuant to #1341, simply because plaintiffs are not seeking any such impairment or derogation of the revenues of the governmental defendants. On the contrary, the positive nature of the injunctive relief being sought by the plaintiffs is actually such that it would, if granted, substantially expand and enhance the tax revenues of the county, the party and the only party against which plaintiffs seek an injunctive remedy. Therefore, there being no incompatibility between due solicitude for the security of the county's revenues,

the damage and the injunctive redress sought by the plaintiffs against the damaging unequal protection of the laws as they bear upon the plaintiffs, the provisions of #1983 and even #1341 require that the court exercise its jurisdiction over and hear the complaint of the plaintiffs on its merits.

Clearly and cogently supporting this conclusion is the pointedly pertinent case of Fulton Market Cold Storage v. Cullerton, 582 F 2d 1071, 1078 (1978):

> ... since it (plaintiff Fulton) seeks damages for the wrongful conduct of officials, Fulton argues that #1341 or its underlying policy considerations are inapplicable. Furthermore, Fulton contends that the purpose of #1983 suits would be thwarted if #1341 were construed to bar damage actions as well.
>
> This court agrees with the plaintiff's argument. As has been demonstrated, #1341 is directed at prohibited equitable relief. The statute, its legislative history and significant cases indicate that the primary evil to be avoided is federal equitable relief which would disrupt the state taxing process. A federal court injunction

> or declaratory judgment would not only undermine and jeopardize a state's ability to collect its revenue but would also seriously damage the delicate balance inherent in our federal system of government.
>
> These concerns are not present in a suit for damages. In the present case the plaintiff is not seeking to enjoin any taxing process. Nor will a judgment for the plaintiff have that effect. Fulton is seeking damages for the alleged wrongful and intentional conduct of certain officials who allegedly deprived Fulton of constitutional rights while acting under color of state law.

Plaintiffs do not have "a plain, speedy and efficient remedy in the Courts of the State."

The language of the Tax Injunction Act, buttressed by the personal civil rights guarantees of the Constitution, contemplate that the plaintiffs are entitled to be heard by the District Court where the remedy for their grievance in the courts of the state is not "plain" and "efficient." Plaintiffs maintain that no plain and efficient remedy is provided in Virginia's courts as follows.

The courts below, espousing the claims of the defendants, hold that the plaintiffs' right of action in the District Court is barred by recent decision of this Court in Rosewell v. LaSalle National Band, 430 U.S. 503, 67 L. Es. 2d 464, 101 S. Ct. 1221 (1981); Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100, 70 1. Ed. 2d 271, 102 S. Ct. 177 (1982); and California v. Grace Brethren Church, 457 U.S. 393, 73 L. Ed. 93, 102 S. Ct. 2498 (1982). However, all of these cases had as their objective "... to enjoin, suspend, or restrain the assessment, levy or collection of ... State taxes" in respect to which there was little, if any, basis for a claim that the laws and courts of the states involved failed to afford "plain, speedy and efficient ..." remedies as contemplated in #28 U.S.C. 1341, in complete antithesis of the requirement for and the availability of a plain and efficient remedy for the inequit-

able non-assessment and non-collection of taxes uniformly.

The courts below maintain that Virginia's Erroneous Assessment tax law (#58-1145, Code of Virginia) provides appellants a plain and efficient remedy. That statute reads in part as follows:

> In such proceeding (to correct an erroneous assessment) the burden of proof shall be upon the taxpayer to show that the property in question is assessed at more than its fair market value or that the assessment is not uniform in its application, or that the assessment is otherwise invalid or illegal ... (underscoring added)

Concerning the nature and purpose of this statute, the Virginia Supreme Court has held that "... assessment means the amount of the tax imposed, and, in the second sentence, the evaluation of the property."

Obviously this statute and the court's own interpretation of it rule out any plain reliability on it for a state court mandate that Franklin County's school-financing utility tax be extended to the tax-exempted benefic-

iaries of the county's school system residing in the defendant Town of Rocky Mount. City of Alexander v. R.F. & P., 223 Va. 293.

Alternatively, in its Opinion the Appeals Court conjectures that the Virginia Supreme Court decisions in Commonwealth v. Tredegar Co., 122 Va. 506, 95 S.E. 279 (1918), and City of Staunton v. Mary Baldwin Seminary, 39 S.E. 596 (Va. 1901), imply that equitable relief would be available thereunder, despite the fact that individual taxpayers in those cases were simply seeking to enjoin, restrain or suspend the assessment and collection of their property taxes -- not to obtain the class-wide extension and collection of a non-property tax such as the excise tax involved in the plaintiffs' case herein. Corroborative of this is the fact that no other kind of tax-challenging suit has ever been brought thereunder in Virginia.

Under these circumstances, persons familiar with Virginia procedural law know that,

if the appellants were to seek the extension of Franklin County's school-supporting utility tax to the exempted school-using class of town taxpayers in the county, a demurrer would almost certainly be filed by the defendant local governments. And, in turn, it would very probably happen that the appellants herein would have to petition the Virginia Supreme Court in hope of obtaining a reversal of the circuit court's ruling sustaining the defendants' demurrer. Therefore any reasonable interpretation of the federal statute providing, in effect, that appellants have a right to have their grievance heard by the District Court because the state's laws do not provide "a plain, speedy and efficient remedy" for them, reasonably requires that this Court reverse the "finding" of the District Court.

This Court has held that where the achievement of tax equity among various taxpayers within a jurisdiction requires an increase

in the taxes of the favored class of tax-payers:

> The constitutional requirement however is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. Township of Hillsborough v. Doris Duke Cromwell, 326 U.S. 620-30, 90 L Ed 358-67.

This being precisely the burden resting on appellants, the above holding of the Supreme Court confirms appellants' right to have their tax grievance adjudicated by the United States District Court. Even the Fourth Circuit Court of Appeals has recently cited with approval the case above quoted in Strescon Industries v. Cohen, 664 F 2d 929, 951, 4th cir., 1981.

The intent of Congress in enacting the Tax Injunction Act was not to deny civil rights complainants of their right to invoke federal court jurisdiction over their grievances except where they genuinely and plainly

have a "plain, speedy and efficient" state remedy -- and not a speculative or imprecise remedy procedurally, and quixotic substantively. And even if it were the congressional intent to limit the constitutional rights of tax complainants to access to the federal courts, it should never be forgotten that the Congress, and even the federal courts, lack the legitimate authority to nullify the rights vouchsafed to citizens by the 1st, 5th and the 14th amendments of the United States Constitution involved in this case.

In their eagerness to curtail the volume of cases there appears to be an undue tendency of the federal courts to disallow the right of citizens to have their meritorious grievances heard by them, by too easily "finding" that the district courts lack jurisdiction, etc. There is reason for appellants to fear that thereby their rights have been short-circuited in this case.

It has long been established in the federal courts that, upon motions to dismiss for alleged want of jurisdiction, the complainants' statements of facts are to be taken as true and correct. Notwithstanding this fact, the Appeals Court's opinion gratituously intrudes into and prejudically expresses judgment on the merits of appellants' complaint improperly, and worse by incorrectly stating the true facts as pleaded by the appellants concerning the nature of their tax complaint and the relief they seek. The Court says:

> We think the suggestion that the federal Constitution requires the town (of Rocky Mount) to earmark its utility tax for school purposes, when this is not required by state law, is simply "frivolous." Appendix, page A-5, fn.

It would be frivolous if appellants had made such a "suggestion". But they have made no such suggestion whatsoever. On the contrary, the relief they seek is the district court's mandate that town residents

must pay the county's school-financing utility tax on the same basis as the rest of the county's school users and taxpayers. (What the town does with the proceeds of its own utility or other taxes is the town's business of course.)

As for the issue raised, not by the defendant town and county but only by the Appeals Court (and contrary to federal rules of procedure) that the utility tax was not "earmarked" for school-supporting purposes, IT WAS NOTORIOUS AND RECOGNIZED BY ALL INTERESTED PARTIES AND NOT DISPUTED BY THE TOWN AND COUNTY IN THIS CASE THAT THE TAX WAS INDEED ADOPTED FOR THE PARTICULAR PURPOSE OF PAYING FOR AN INCREASE IN THE COUNTY SCHOOL TEACHERS' SALARIES, AND THIS THE APPELLANTS CAN PROVE.

No taxes in the state are earmarked for particular purposes. Nevertheless it is commonplace and perfectly proper for accurate budget computations to be made and applied to

the question of what additional tax levy is required and to be used to meet a particular additional cost of an additional governmental undertaking. This is precisely what occurred in respect to Franklin County's utility tax when it was being considered, debated and adopted. In any case approximately 80% of the county government costs are for the county schools. So there is no disputing the nature, the amount and the purpose of the utility tax of Franklin County.

Under the law, if Rocky Mount had a one-half of one percent utility tax of its own when the county adopted its 20% utility tax, or if thereafter the town adopted such a tax, it would defeat the county's right to collect its 20% school-supporting utility tax from the town inhabitants who equally are served by the county's public schools. Mirabile dictu, under the logic of the Court's claim that no constitutional wrong is involved in this inequitable tax dispensation, it would

be quite legitimate (constitutional) for the state law to exempt all Virginia town residents from all Virginia county taxes while the town residents fully and equally enjoy the benefits of the county schools!

It must be concluded that the lower courts have simply failed to reason through the constitutionally sinister implications of state-law exemption of town residents of a county from county taxes most of which are necessarily allocated to support of the county schools.

## III. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT MISCONSTRUED AND MISAPPEALED BY THE LOWER COURTS

> ...To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable or groundless, or that the plaintiff continued to litigate

> after it clearly became so ... Christiansburg Garment Co. v. EEOC, 434 U.S. 112, 54 L Ed 2d 648.

It is quite evident that it was not within the contemplation of the Supreme Court that, merely because a district court "finds" that it lacks jurisdiction over a civil rights claim asserted by bona fide complainants that therefore they should be ordered to pay the "prevailing" defendant's attorney's fees. And it must be inferred that it was never even imagined by the Court that state governmental defendants who "prevail" are to be awarded their defense counsel's fees where the court "finds" that it lacks jurisdiction over the subject matter of the suit.

Even more relevantly, the Court added:

> In applying these criteria (of what is a frivolous case), it is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can

> a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit. Id. at 657.

On the basis of these dicta alone by the Supreme Court, the district court and the Appeals Court panel have acted quite unjustly in approving assessments of the governmental defendants' lawyers' wages against the bona fide complainants in the circumstances of this case.

Before the enactment of the Civil Rights Attorney's Fees Awards Act by Congress (1976), the bona fide civil rights complainants herein could not have been subject to an assessment of attorneys' fees of the "prevailing" defendants as has befallen the plaintiffs herein because there was no color of authority then

for such defendants to demand recovery of such fees under "the American Rule." Certainly it is a fact that the circumstances and the history of the Civil Rights Fees Awards Act show that it was the intent of Congress thereby to assist and facilitate--NOT ERECT A "CHILLING" DETERRANT -- to the vigorous "private enforcement" of the civil rights laws. This is demonstrated by the following excerpts from the debate of the Fee Awards Act by Congress:

> This bill creates no startling new remedies -- it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's (Alyeska) decision. (Emphasis in the original text) Senate Report 94-1011, 1976.

Senator Edward Kennedy, Senate floor leader of the bill, commented as follows:

> The bill now before us, Mr. President, does not create any new legal remedies, nor does it expand our civil rights laws into new areas which Congress has not previously considered. It merely lends sub-

> stance to the private enforcement of rights already authorized under existing civil rights. Furthermore, the bill does not create any new burdens for the courts. Rather, it is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees that they have been allowing prior to the Alyeska decision.

In the House debate on the bill, the following comments were made:

> It is clearly not the intent of Congress to create a new remedy. (Representative Railsback, 122 Cong. Rec. 35117).
>
> The Alyeska decision ended that practice (awarding plaintiffs' attorney fees) which this bill seeks to restore. (Rep. Drinan Id. 35122).
>
> This bill restores to the courts authority which they had exercised for years under the private attorneys general concept. Id. at 35126, comment by Representative Fish.
>
> This is a first step ... it does not overturn law or practice, except the Alyeska case. (Comment by Representative Kastenmeier, Id. at 35126.)

In defiance of the congressional intent and the constitutional objections, the lower federal courts, in this and a few other cases,

have assessed state governmental defendants' attorneys' fees against civil rights plaintiffs on the frivolous ground that a finding by the courts that they lack jurisdiction entitles the prevailing governmental defendants to be recompensed of their attorney charges and/or salaries at the expense of the plaintiffs. This Court assuredly should reverse the assessment of this oppressive punishment against the appellants for the plethora of reasons herein set forth.

## IV. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT AS APPLIED RAISES A QUESTION OF ITS CONSTITUTIONALITY

1. This Act, designed to further the private enforcement of civil rights, may not be construed to authorize assessments of governmental defendants' attorney fees at the expense of bona fide citizen plaintiffs without drawing into question the constitutionality of the Act in this respect.

The Act, 42 U.S.C. 1988, provides that:

> In any action or proceeding to enforce a provision of ... 42 U.S.C. 1983 ... The court may, in its discretion, allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs.

The one civil right prerequisite to all other rights is the right of aggrieved citizens to seek court enforcement of their rights without risk that, if the governmental defendant turns out to be the "prevailing party", they can not be subjected to counter attack and reprisals at the hands of the government. That is to say, without the right to seek enforcement of one's rights in the courts, one has no rights. Needless to add, if citizens are subject to liability to pay the governmental defendants' super-size lawyers' fees, if their challenge to the validity of state law or action is rebuffed by the courts, their constitutional rights, purportedly secured by the 1st, 5th and 14th amendments, no longer exist.

The fallacy of court awards of attorney fees to successful state defendants is based on the implicit but totally fallacious assumption that the state has the same civil rights against the citizens as they have against the state in court challenges to the constitutionality of state law or action.

Only persons have civil (constitutional) rights. The state has none. And the state's cost of its defense counsel must be accepted as a necessary and proper operating expense of maintaining a society free of arbitrary and tyrannical oppression. This right and benefit of a free society have been secured heretofore by our federal courts via their enforcement of the freedoms guaranteed by the 1st, 5th and 14th amendments of the Constitution. But now, in the case of the appellants, the courts below have denied the appellants the right guaranteed by the 1st amendment peaceably "... to petition the Government for redress of grievances" without subjection to

reprisals, denial of due process, property, etc. In the context of the facts of this case, the role of our courts amounts to a monstrous travesty on justice and the Bill of Rights, making it necessary that this Court vindicate the civil rights of the appellants by reversing the rulings of the courts below.

2. Virginia law does not authorize the state (including, of course, its governmental subdivisions) to recover the salaries or fees of its defense counsel in cases in which citizens attack the validity of state law or action. In short, throughout the history of the Commonwealth of Virginia its citizens have enjoyed state constitutional and common law immunity from claims of the state for recovery of its attorneys' fees (damages as the Attorney General of Virginia calls them. Brief of the Attorney General in Pulliam v. Allen et al., 1045 Sup. Ct. 1970, 80 L. Ed. 2d 565).

Being ineligible under Virginia law, to exact such damages from the appellants, the courts ought not to assume that the state defendants are "entitled" to recover attorney fees from the appellants merely because they are the "prevailing parties". Rather, the courts should ascertain and apply the state law in accordance with the landmark Rule of Decision promulgated by the Supreme Court in Erie Railway Co. v. Thompkins and its progeny. 304 U.S. 64, 58 S CT 817, 82 L Ed 1188 (1938).

Instead of doing this, the courts below have presumed (without examining the question) that Congress conferred the authority on the federal courts to confer the authority on the state to assess damages (attorney fees) against civil rights plaintiffs (appellants) where the state is found to be the "prevailing party", per #1988, regardless of the fact that the state's own laws afford immunity of its citizens from such oppressive claims of the state against them. Not only is the posi-

tion of the courts in this matter violative of the Rule of Decision (Thompkins); it is flagrantly violative of the federal courts' own doctrine of comity which holds that, instead of intruding into and disregarding state law, the federal courts should defer to and honor the laws and processes of the state!

By what legal logic can the federal courts justify this usurpation?

3. In the recently-decided landmark case of Pulliam v. Allen, cit. sup., it appears that, by necessary implication, the Supreme Court has overruled the judgment of the District Court and the Appeals Court judgment that appellants are legally and justly obligated to pay the state's attorney fees ordered by the District Court.

In Pulliam, the Supreme Court imposed conformity by the state with its own law affording immunity of Allen from incarceration where state law did not authorize it in connection with his offense (misdemeanor).

If Virginia's lack of its own legal authority to jail Allen when he was unable to post bail, made Judge Pulliam's incarceration of him impermissibly abusive of his civil rights, entitling him to sue and to obtain an injunction and his attorney's fees (de facto damages) against Judge Pulliam, it is only reasonable that this Court must likewise conclude that the state's lack of state-law authority to claim attorneys' fees (the "functional equivalent of damages"according to the state's attorney general) from appellants likewise entitles them to immunity from this oppressive claim of the state.

Since the Supreme Court's enunciation of Rule of Decision in Thompkins, cit. sup., it has been incumbent on the federal courts to ascertain and apply the local (state) law where there is a conflict of laws, so as to make the outcome of litigation in federal courts conform to the outcome which would have occurred in the state courts, except

where such an approach would result in a violation of a paramount federal law. The rationale of this basic rule is ignored by the federal courts in respect to the emergent issue of whether "prevailing" state defendants in civil rights cases are subject to the sanctions of the state's own law as well as the provisions of the Bill of Rights of the United States Constitution.

Again, in the light of Thompkins, and the doctrine of comity, how can the presumption be countenanced that the Civil Rights Attorney's Fees Awards Act abrogated state-law denial of the state's authority to claim attorney's fees from unsuccessful civil rights plaintiffs?

The opinion of the lower courts, while invoking the old shibboleth of "comity" to justify refusal to uphold plaintiffs' right to have their complaint heard by the district court, is ignoring -- indeed violating -- comity by not ascertaining what the state law

is and deferring to it in respect to the state's attorneys' fees claims against the appellants, not authorized by the law of the state.

Appellants are advised, believe and maintain that the state governmental defendants' asserted claim to de facto damages (attorneys' fees) from appellants is violative of their right of immunity from such claim fixed by the law of the state, and that, even disregarding the doctrine of comity, the state law is paramount over any federal statute or court ruling purporting to abrogate such state law which right is secured to the appellants by the 10th and 14th amendments of the United States Constitution.

In the teeth of the foregoing, the state defendants callously and recklessly asserted the unauthorized right to claim the damages in question, in violation of appellants' rights secured by Virginia's Bill of Rights and the state's common law.

The Constitution of Virginia provides that:

> All power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them, and
>
> That all power of suspending laws by any authority, without consent of the people, is injurious to their rights, and aught not to be exercised and that they have the right ... to petition the government for a redress of grievances.

The conclusion is inescapable that the demand of the state defendants (respondents) for damages (attorney's fees) at the expense of the bona fide plaintiffs is, per se, an arrogant act of contempt for the above quoted constitutional and common law limitations on the state's authority to inflict reprisals upon citizens who unsuccessfully attack the constitutionality of discriminatory state law.

4. If it were constitutionally permissible for state governmental defendants to recover damages (attorney's fees) from their unsuccessful civil rights complainants against

constitutionally questionable state laws, all logic, rational law and civilized morality dictate that the complainants' lawyers ("officers of the court" and legal experts) -- not the legally uneducated clients -- should be required to pay the damage award to the state, if anybody is to be subjected to this "chilling" responsibility.

The layman, being untrained in the subtlies of the law, is of course incompetent to make informed judgments on such technical questions as to whether the court may lack jurisdiction or whether their complaint is legally "without foundation, groundless, and frivolous." Even for learned lawyers such judgments may well be speculative in nature, because the relevant criteria are inherently imprecise in application. Therefore holding the lawyers' clients, instead of their legally expert lawyers, to be the wrongdoers responsible for the attorneys' fees of the governmental defendants is about as rational and just as

holding unwell patients responsible to their doctors for telling them what is medically wrong with them, on pain of severe penalty if they fail to do so correctly. Indeed such "justice" is so alien to all logic of constitutional rights that it is shocking and revolting to the conscience of all civilized societies BECAUSE IT IS A LEGAL RULE WHICH PUNISHES THE INNOCENT VICTIM OF WRONGDOING INSTEAD OF THE KNOWLEDGABLE WRONGDOER.

## V. CONCLUSION

This case presents issues of comprehensive and fundamental constitutional rights of all citizens of the United States and urgently requires plenary review by this Court in view of the facts indicated herein that (i) the Fourth Circuit Court of Appeals has rendered a decision in conflict with another Court of Appeals (Fifth Circuit); (ii) in conflict also with an important question of federal law which has not been, but should be, settled

by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court; and (iii) which decision has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

FOR THE MANY REASONS STATED HEREIN, the Court should, and is requested to grant a writ of certiorari in this case.

* * * * * * *

Because the constitutionality of an Act of Congress is drawn into question herein, and 28 U.S.C. #2403(a) may be applicable, a copy of this Petition is also served on the Solicitor General, Department of Justice, Washington, D.C. 20530.

Respectfully,

John H. Kennett, Jr.
133 Kirk Avenue, Southwest
Roanoke, VA 24011

Attorney for Petitioners

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

OPHUS A. HUTCHERSON, JR. et al
Petitioner,

v.

BOARD OF SUPERVISORS OF
FRANKLIN COUNTY, VIRGINIA et al
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS
FOR THE FOURTH JUDICIAL CIRCUIT

# APPENDIX

JOHN H. KENNETT, JR.
133 Kirk Avenue, S. W.
Roanoke, Virginia 24011
Telephone: (703) 345-0946

Counsel for Petitioners

TABLE OF CONTENTS

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS . . . . . A-2

DENIAL OF THE APPELLANTS' PETITION FOR REHEARING BY THE FOURTH CIRCUIT COURT OF APPEALS . . . . . A-13

ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA, FIXING AND ASSESSING ATTORNEYS' FEES AGAINST THE APPELLANTS . . . . . A-21

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT HOLDING PETITIONERS' SUIT FRIVOLOUS FOR LACK OF THE COURT'S JURISDICTION, AND HOLDING THAT THE DEFENDANTS ARE ENTITLED TO THEIR ATTORNEYS' FEES AT PETITIONERS' EXPENSE . . . . . A-15

ORDER OF THE DISTRICT COURT DISMISSING PLAINTIFFS' SUIT ON GROUND OF LACK OF JURISDICTION . . . . A-27

CONSTITUTIONAL PROVISIONS . . . . . A-29

**STATUTES INVOLVED**.....A-30

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 82-2109

---

OPHUS A. HUTCHERSON, JR.,
W. H. HOUSEMAN, A. W. LYNCH,
BRUCE HIGGINS, O. K. TENCH,
KENNETH D. CAMPBELL, ALLEN PERDUE,
JAMES BOUSEMAN, JACKSON JEWELL,
J. CARL POINDEXTER, who sue on
behalf of themselves and all
others similarly situated

Appellants

and

A. DALE BROWN, RICHARD O. ANGLE,
HAROLD E. PALMER, PAUL SMITH,
JOSEPH FORDHAM, ROGER FLOWERS,
DICK ROBERTSON,

Plaintiffs

v.

BOARD OF SUPERVISORS OF
FRANKLIN COUNTY, VIRGINIA:
TOWN OF ROCKY MOUNT, VIRGINIA,

Appellees

---

Appeal from the United States District Court
for the Western District of Virginia, at
Roanoke. Jackson L. Kiser, District Judge.
C/A 82-0377

---

Argued December 7, 1983 Decided August 23, 1984

---

Before WIDENER and HALL, Circuit Judges, and HOFFMAN, Senior District Judge*

---

*United States District Court for the Eastern District of Virginia, sitting by designation.

---

WIDENER, Circuit Judge:

In July 1980, the Board of Supervisors of Franklin County, Virginia levied a utility tax upon its citizens pursuant to Va. Code #58-617.2.[1] Plaintiffs, in May of 1982, filed this action in the United States District Court for the Western District of

---

[1] Va. Code #58-617.2 then provided in pertinent part (1982 and 1984 amendments do not affect this case):

> Any city or town or county may impose a tax on the consumers of the utility service or services provided by any corporation coming within the provisions of this article ...
>
> Any county, city or town may impose a tax on the consumers of services provided within its jurisdiction by any electric light and power, water or gas company owned by another municipality; ... Any county tax imposed hereunder shall not apply within the limits of any incorporated town located within such county which town now or hereafter imposes a town tax on consumers of utility service or services ...

Virginia challenging the validity of that tax. The district court dismissed the action and awarded attorneys' fees to the defendants, Board of Supervisors of Franklin County, Virginia (County) and Town of Rocky Mount (Town). Plaintiffs appeal, and we affirm.

The Town of Rocky Mount, Virginia is located within Franklin County, Virginia. Under Virginia law, towns such as Rocky Mount may levy taxes within their jurisdiction for purposes of funding the town's government, in addition to those taxes levied by the county. See, for example, Va. Code #58-844, 845. The Town of Rocky Mount has for several years levied a utility tax upon its residents for the purposes of the Town. Franklin County recently levied its own utility tax pursuant to Va. Code #58-617.2. Consistent with the terms of the statute, Franklin County could not collect its utility tax from its residents who reside in the Town of Rocky Mount since the Town already imposed a utility tax.

Plaintiffs challenged the constitutionality of #58-617.2 because County residents were required to pay the County utility tax while Town residents were not. They submit that the County utility tax was used to help support the County school system, and that, since both County and Town residents use the County's school system (the town does not have a separate school system), the Town residents should be required to pay the County utility tax.[2]

Plaintiffs sought a declaratory judgment from the district court that the County utility tax enacted under #58-617.2 discriminated against County residents in violation of the

---

[2]While there is some discussion that the County enacted the utility tax to provide revenue for a short fall in the school system's budget, the parties acknowledge that the tax is not earmarked by statute. Thus it may be used for general County purposes

Constitution because the Town residents using the county schools were not taxed by the County. They also sought a mandatory injunction requiring that Town residents be required to pay the County utility tax. Finally, they sought damages equal to the difference between the amount of utility taxes actually paid and the lower amount that would have been paid had Town residents been required to pay the County tax in addition to their own.[3]

The Town and the County moved to dismiss the complaint on the grounds that such action was barred by the Tax Anti-Injunction Act, 28 U.S.C. #1341, and that in any event a cause of action was not stated. The district court dismissed the case without opinion.

---

[3]We think the suggestion that the federal Constitution requires the Town to earmark its utility tax for school purposes, when this is not required by state law, is simply frivolous. The same may be said of the request for imposition of the County tax within the Town, contrary to the positive provisions of state law.

The Tax Anti-Injunction Act, 28 U.S.C. #1341, provides that "the district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

The Supreme Court has consistently construed #1341 to drastically limit federal court intervention into state tax matters. Rosewell v. LaSalle National Bank, 450 U.S. 503, 522 (1981). We have given that statute a similar construction. Strescon Ind. v. Cohen, 664 F 2d 929 (4th Cir. 1981). The statute in terms forbids injunctions and the Court has specifically held that #1341 bars federal suits seeking declaratory relief so long as a plain, speedy and efficient state remedy exists. California v. Grace Brethren Church, 457 U.S. 393, 408 (1982). The principles of comity bar federal courts from

considering suits for damages under 42 U.S.C. #1983 challenging a state tax, providing adequate state remedies exist. Fair Assessment in Real Estate Assoc. v. McNary, 454 U.S. 100 (1981).

Clearly, plaintiffs are barred from seeking federal court review if Virginia provides them a plain, speedy and efficient state court remedy. The state remedy must meet certain minimal procedural criteria. Rosewell, supra, at 512. It is a plain, speedy and efficient remedy if it "provides the taxpayer with a 'full hearing and judicial determination' at which ... the taxpayer may raise any and all constitutional objections to the tax." Id. at 514, 515 n. 19, quoting LaSalle National Bank v. County of Cook, 57 Ill. 2d 318, 324, 312 N.E. 2d 252, 255-6 (1974). In Rosewell the Court approved a state court remedy that required a taxpayer to pay the tax under protest and then seek a refund, although if the taxpayer ultimately

prevailed the tax was refunded but no interest was paid.

A review of the remedies provided under Virginia law convinces us that plaintiffs have a plain, speedy and efficient remedy. In a departure from the general rule, it has been well settled in Virginia for years that the collection of an illegal tax may be enjoined at the instance of an individual taxpayer by a court of equity unless there is an adequate remedy at law. See Commonwealth v. Tredegar Co., 122 Va. 506, 95 S.E. 279 (1918); City of Staunton v. Mary Baldwin Seminary, 39 S.E. 596 (Va. 1901). The remedy at law is made available under Virginia Code #58-1145 and similar statutes. See Chapter 21, Article 2 of Title 58 of the 1950 Virginia Code. The relief, of course, granted by a court of equity is complete relief, and the relief granted under the Code is not confined to correction of erroneous assessments, Todd v. County of Elizabeth City, 191 Va. 52, 60

S.E. 2d 23 (1950), but also includes those claimed to be unconstitutional, illegal and void. Chesapeake and Potomac Tel. Co. v. City of Newport News, 194 Va. 409, 73 S.E. 2d 394 (1952). The statutes are to be liberally construed in order to further the remedy provided, and their object is to furnish an "expeditious and inexpensive remedy against taxes which have been assessed or collected." 73 S.E. 2d at p. 397. While the Virginia Court's broad reading of the statutes on the correction of illegal or erroneous assessment or collection of taxes leads us to believe there is some chance that suit under Va. Code #58-1145 might be entertained, although the problem complained of here is not precisely mentioned in #1145, should it not be, it is certain that a bill in equity in the Virginia courts would lie to correct the complaint of the plaintiffs. And even if a bill in equity were erroneously brought, stating plaintiffs' complaint, and

an adequate remedy at law were found to exist, see Va. Code #58-1158, then the case would not be dismissed but would be transferred to the law side of the docket. Chesapeake and Potomac Tel. Co., at 73 S.E. 2d 399.

We are thus of opinion that Virginia offers plaintiffs in her courts the opportunity for a plain, speedy and efficient remedy within the meaning of 28 U.S.C. #1341.

Plaintiffs next challenge the award of attorneys' fees to the Town and the County as prevailing parties under 42 U.S.C. #1988. Such fees are allowable in the court's discretion when a suit is unreasonable, frivolous, or meritless within the meaning of Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

When plaintiffs initiated this action, the law was settled both by statute and decision that a federal court could not entertain such a suit for injunctive relief unless no plain, speedy and efficient state court remedy existed. McNary precluded a suit for

damages. Any doubt that an action for discretionary declaratory relief could be maintained after Great Lakes Bridge & Dock Co. v. Hoffman, 319 U.S. 393 (1943), was dispelled one month after the complaint was filed in this case by the Supreme Court in Grace Brethren Church which decided that declaratory relief was simply not available because of 28 U.S.C. #1341. Following that decision, however, the plaintiffs amended their complaint to ask for more, rather than less, declaratory relief. And so the case was when it came on for hearing.

In light of the settled principles of law existing before the filing of this action and handed down during the action, all before the hearing in the district court, we conclude that plaintiffs' suit is meritless within the meaning of Christiansburg Garment Co., in that it is unreasonable or groundless and that the plaintiffs continued to litigate

after it clearly became so. Christiansburg Garment Co., at 422.

The district court, having found that plaintiffs' action was frivolous as a matter of fact and law, was ever so careful in its assessment of attorneys' fees. It required affidavits showing literal item by item compliance with the twelve criteria established in this circuit in Barber v. Kimbrell's Inc., 577F 2d 216, 226, note 28 (4th Cir. 1978).

We are thus of opinion the district court did not abuse its discretion either in the award of attorneys' fees or in the amount thereof.

The judgment of the district court is accordingly

AFFIRMED[4]

[4]The Seventh Circuit has affirmed the award of attorneys' fees in a similar case. Werch v. City of Berlin, 673 F. 2d 192 (7th Cir. 1982).

UNITED STATES COURT OF APPEALS
For The Fourth Circuit

No. 82-2109

---

OPHUS A. HUTCHERSON, JR., et al

Appellants

v.

BOARD OF SUPERVISORS OF
FRANKLIN COUNTY, VIRGINIA et al

Appellees

O R D E R

---

There have been two petitions for rehearing filed in this case, one for the appellants by their attorney, the other by J. Carl Poindexter, pro se, each of which suggested rehearing en banc.

The petition for rehearing filed by appellants' attorney was timely filed, while the petition filed by Poindexter was out of time. Although the Poindexter petition was filed out of time, we are of opinion to, and

do, consider the same on its merits, and it is accordingly ORDERED that the Poindexter petition shall be, and it hereby is, permitted to be filed.

There having been no request for a poll of the court, it is according ADJUDGED and ORDERED that the petitions for rehearing en banc shall be, and they hereby are, denied.

The panel has considered the petitions for rehearing and is of opinion they are without merit.

It is accordingly ADJUDGED and ORDERED that the petitions for rehearing shall be, and they hereby are, denied.

With the concurrence of Judge Hall and Judge Hoffman.

_____

For the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

| | |
|---|---|
| OPHUS A. HUTCHERSON, JR., ET AL.<br>Plaintiffs<br><br>v.<br><br>BOARD OF SUPERVISORS OF FRANKLIN COUNTY, VIRGINIA: and TOWN OF ROCKY MOUNT, VIRGINIA<br><br>Defendants | Civil Action No. 82-0377-R<br><br>MEMORANDUM OPINION AND ORDER<br><br>By: Jackson L. Kiser, Judge United States District Court |

On November 3, 1982, I entered an Order dismissing the Plaintiff's Complaint. On November 15, 1982, and on November 16, 1982, the Defendants, Town of Rocky Mount and Board of Supervisors of Franklin County, respectively, moved the Court to allow attorneys' fees pursuant to 42 U.S.C. #1988. Subsequently, the Plaintiff Poindexter, on December 2, 1982, filed a Notice of Appeal. Thereafter, on Dec. 20, 1982, the remaining Plaintiffs moved the Court for an extension of time in which to file their Notice of Appeal. On December 9, a hearing was held at which time the Defendant Town of

Rocky Mount suggested that the Court was without jurisdiction to consider the matter of attorneys' fees because the appeal taken by the Plaintiff Poindexter had ousted the Court of jurisdiction citing as its authority the Fourth Circuit case of Wright v. Jackson, 522 F. 2d 955 (4th Cir. 1975). I did not consider the merits of the request for attorneys' fees, but took under consideration the issue of whether this Court had jurisdiction to award attorneys' fees.

The Supreme Court has recently considered the question of attorneys' fees under 42 U.S.C. #1988 in the case of White v. New Hampshire Department of Employment Security, Slip Opinion No. 80-5887 (March 2, 1982), and based on that opinion I conclude that this Court did not lose jurisdiction to consider the matter of attorneys' fees. Thus, I shall consider the issue of attorneys' fees.

For a defendant to recover attorneys' fees under 42 U.S.C. #1988, the court must find: (1) that the defendant was the prevailing party; and (2) that the plaintiff's action was frivolous, unreasonable or without foundation. There is no question that in this case the Defendants were clearly the prevailing parties. The only remaining question is whether the Plaintiff's action was "frivolous, unreasonable or without foundation." I find as a matter of fact and as a matter of law that the Plaintiff's action was frivolous. Unlike Christiansburg Garment Company v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978), this case was not one of first impression. The anti-injunction statute has long been on the books and has been definitively interpreted by the United States Supreme Court. Any fair reading of the statute and the Supreme Court cases interpreting it clearly instructs that a United States District Court may not enter-

tain an action which in any way challenges the state's levying and collecting of taxes where the state provides a speedy and efficient procedure for challenging such actions. Virginia clearly provides such a procedure. Accordingly, I find that the Defendants are entitled to attorneys' fees, but that does not end the inquiry.

The Fourth Circuit has established twelve criteria for fixing attorneys' fees. Barber v. Kimbrell's, Inc., 577 F 2d 216, 226, fn. 28 (4th Cir. 1978). They are:

1. The amount of time spent on the case.

2. Whether the case was novel or difficult;

3. The degree of skill required to properly perform the representation;

4. Whether the attorney lost an opportunity for other business;

5. The customary fee for trial work of a similar nature;

6. The attorney's expectations at the

outset of the litigation;

7. Time limitations imposed upon the attorney by the client or circumstances;

8. The seriousness of the subject matter of the controversy and the result obtained;

9. The experience, reputation and ability of the attorney;

10. Whether the attorney was representing an unpopular cause which may have incurred the hard feelings of the public toward him;

11. Whether an attorney/client relationship existed between the attorney and his client prior to the case; and

12. Attorney fee awards in similar cases.

Counsel for the Defendants have previously submitted to the Court affidavits as to the amount of time they spent on the case and as to their hourly charges. However, there is no evidence in the record as to the remaining criteria. It is, therefore, ORDERED that the counsel for the Defendants submit to the

Court, in affidavit form, the remaining required information.

The Clerk is directed to send certified copies of this Memorandum Opinion and Order to all counsel of record.

ENTER this 10th day of January, 1983.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

| | |
|---|---|
| OPHUS A. HUTCHERSON, JR., ET AL)<br>)<br>Plaintiffs )<br>)<br>v. )<br>)<br>BOARD OF SUPERVISORS OF )<br>FRANKLIN COUNTY, VIRGINIA, and )<br>TOWN OF ROCKY MOUNT, VIRGINIA )<br>)<br>Defendants ) | Civil Action<br>No. 82-0377-R<br><br>ORDER |

This matter came on again for the Court to consider the Plaintiffs' Motion for Reconsideration of the Court's Order of January 10, 1983, awarding attorneys' fees to Defendants' counsel. The Motion for Reconsideration is hereby denied.

At the direction of the Court, counsel for Franklin County and the Town of Rocky Mount have submitted affidavits touching on the twelve points set forth in the Court's Order of January 10, 1983. Based on those affidavits and upon the Court's empirical knowledge of

the charges, rates and customs of attorneys in the Western District of Virginia, I hereby find the following:

A. As to counsel for the Town of Rocky Mount -- Mr. Greer:

1. The amount of time spent by him on the case was 45-1/2 hours out of Court and 1 hour in Court.

2. As my earlier opinion indicated, the case was not novel nor was the presentation of the points of law difficult.

3. The skill required of the attorney was that of a competent, experienced lawyer but did not require specialized expertise.

4. The attorney lost no opportunity for other business.

5. The customary range of attorneys' fees for experienced trial attorneys in the Western District of Virginia ranges from $60.00 per hour to $85.00 per hour for out-of-court work and from $100.00 per hour to

$150.00 per hour for in-court work.

6. The attorney expected the client to pay his usual and customary charge.

7. There were no special constraints imposed upon the attorney by the client or circumstances.

8. The subject matter of the case was most serious. Had the Plaintiffs prevailed, the decision would have been most disruptive to established tax procedures in the Commonwealth of Virginia between municipalities and counties and would have had a disruptive effect on their financial planning.

9. The attorney is a highly experienced, very able and well-reputed attorney.

10. The cause which was being litigated was not an unpopular cause or one which would hold the attorney up to public scorn.

11. An attorney-client relationship did exist between the attorney and the client prior to the case.

12. Attorney fee awards in "civil rights" type cases in the Western District of Virginia have generally been based on the foregoing eleven criteria and do vary based on that criteria with the major consideration being time expended and rate of pay.

B. Counsel for Franklin County -- Mr. Rakes:

1. Amount of time spent (no distinction is made between in-court and out-of-court time in the affidavit) by Mr. Rakes was 14-1/2 hours and 4-1/2 hours by an associate.

2. As to Items 2 through 10 and Item 12, I make the same findings as I made with regard to counsel for Rocky Mount.

3. As to Item 11, I find that no prior attorney-client relationship existed between Mr. Rakes and Franklin County.

Based on the foregoing findings, I award counsel for the Town of Rocky Mount a fee

based on an out-of-court rate of $75.00 per hour x 45-1/2 hours which equals $3,412.50, and an in-court rate of $100.00 per hour which equals $100.00 for a total attorney's fee of $3,512.50.

As to counsel for Franklin County, since there is no distinction as to in-court and out-of-court work, I will award a fee for Mr. Rakes' work at a rate of $75.00 per hour for 14-1/2 hours which equals $1,087.50 and for the associate's work at the rate of $50.00 per hour for 4-1/2 hours which equals $225.00 for a total attorneys' fee of $1,312.50.

Associate counsel for Franklin County, Bruce E. Welch of Davis, Davis and Welch, was shown on the original bill of costs submitted by Franklin County as claiming $686.25 in attorney's fees. However, no affidavit has been submitted by Mr. Welch and, therefore, the Court is not in a position to fix attorney's fees for Mr. Welch.

The Clerk is directed to send certified copies of this Order to all counsel of record.

Enter this 1st day of April, 1983.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROANOKE DIVISION

| | | |
|---|---|---|
| OPHUS A. HUTCHERSON, JR., ET AL,<br><br>Plaintiffs<br><br>v.<br><br>BOARD OF SUPERVISORS OF FRANKLIN COUNTY, VIRGINIA and TOWN OF ROCKY MOUNT, VIRGINIA,<br><br>Defendants | ) | Civil Action No. 82-0377-R<br><br>ORDER |

Both Defendants, Board of Supervisors of Franklin County, Virginia, and Town of Rocky Mount, Virginia, have filed Motions to Dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure. After due consideration of the briefs and the arguments of counsel, the Court is of the opinion that the Motions are well taken, and it is, therefore, ADJUDGED and ORDERED that the Plaintiffs' Complaint be and is hereby DISMISSED and this action shall be and hereby is dismissed from the active

docket of the Court.

The Clerk is directed to send certified copies of this Order to all counsel and to Dr. J. Carl Poindexter.

ENTER this 3rd day of November, 1982.

United States District Judge

# CONSTITUTIONAL PROVISIONS

## Amendment I

"Congress shall make no law ... abridging the ... right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

## Amendment V

"No person shall be ... deprived of life, liberty, or property, without due process of law ..."

## Amendment X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

## Amendment XIV

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATUTES INVOLVED

28 U.S.C. 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution and laws, or treatises of the United States.

28 U.S.C. 1341:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. 2403(a):

In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General ...

28 U.S.C. 2101(c):

Any ... writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree.

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

42 U.S.C. 1988:

In any action or proceeding to enforce a provision of 42 U.S.C. 1983 ... the district court may, in its discretion, allow a reasonable attorney's fee as part of costs to the prevailing party other than the United States.

56-617.2, Code of Virginia of 1950 as amended:

Any county (utility) tax imposed hereunder shall not apply within the limits of any incorporated town located within such county which town now or hereafter imposes a town tax on consumers of utility services ..., provided that such town (1) provides police or fire protection, and water of sewer services ...

58-1145

In such proceeding (to correct an erroneous assessment) the burden of proof shall be upon the taxpayer to show that the property in question is assessed at more than its fair market value or that the assessment is not uniform in its application, or that the assessment is otherwise invalid or illegal ...

(2)

No. 84-1057

FILED
JAN 30 1985
ALEXANDER L. STEVAS,
CLERK

# IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1984

OPHUS A. HUTCHERSON, JR., et al.,
Petitioners,

v.

BOARD OF SUPERVISORS OF FRANKLIN COUNTY, VIRGINIA
and
TOWN OF ROCKY MOUNT, VIRGINIA,
Respondents.

---

# BRIEF IN OPPOSITION OF RESPONDENT, BOARD OF SUPERVISORS OF FRANKLIN COUNTY, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

COUNSEL OF RECORD:
William R. Rakes
GENTRY, LOCKE, RAKES & MOORE
800 Colonial Plaza
P. O. Box 1018
Roanoke, Virginia 24005

OF COUNSEL:
John M. Huddle
GENTRY, LOCKE, RAKES & MOORE
800 Colonial Plaza
P. O. Box 1018
Roanoke, Virginia 24005

Bruce F. Welch
WELCH & JEFFERSON
126 S. Main Street
Rocky Mount, Virginia 24151

Counsel for Respondent,
Board of Supervisors of Franklin County, Virginia

## QUESTIONS PRESENTED

I. DID THE DISTRICT COURT AND THE FOURTH CIRCUIT ERR IN RULING THAT, UNDER 28 U.S.C. § 1341 (THE TAX INJUNCTION ACT) AND THE FEDERAL COMMON LAW PRINCIPLE OF COMITY, THE DISTRICT COURT LACKED JURISDICTION TO GRANT MANDATORY INJUNCTIVE RELIEF FROM THE ALLEGEDLY UNCONSTITUTIONAL VIRGINIA TAXING STATUTE SINCE VIRGINIA LAW PROVIDES THE PLAINTIFF TAXPAYERS WITH A PLAIN, SPEEDY AND EFFICIENT REMEDY TO REDRESS THE TAXPAYERS' CONSTITUTIONAL CLAIMS IN THE COURTS OF SUCH STATE?

II. SINCE THE DISTRICT COURT AND THE FOURTH CIRCUIT CONCLUDED THAT ANY FAIR READING OF 28 U.S.C. § 1341 AND THE RELEVANT RECENT CASES OF THIS COURT RENDER THE TAXPAYERS' FEDERAL SUIT MERITLESS, AND THE FIFTH CIRCUIT CASES WHICH THE TAXPAYERS PURPORTEDLY RELIED UPON AS AUTHORITY FOR THEIR CLAIM FOR MANDATORY INJUNCTIVE RELIEF ANTEDATE SUCH DECISIONS OF THIS COURT, DID THE LOWER COURTS ERR IN ORDERING THE TAXPAYERS TO PAY ATTORNEYS' FEES UNDER 42 U.S.C. § 1988 FOR INSTITUTING AND PERSISTING TO LITIGATE A FRIVOLOUS CIVIL RIGHTS SUIT?

III. UPON CONCLUDING THAT THE TAXPAYERS HAD FILED A FRIVOLOUS AND MERITLESS CIVIL RIGHTS ACTION IN FEDERAL COURT

AND PERSISTED TO LITIGATE THEIR ACTION AFTER THE FRIVOLOUSNESS OF SUCH BECAME APPARENT, DID THE DISTRICT COURT AND THE FOURTH CIRCUIT ERR IN ORDERING THE PLAINTIFF TAXPAYERS THEMSELVES TO PAY THE REASONABLE ATTORNEYS' FEES OF THE FRANKLIN COUNTY BOARD OF SUPERVISORS AND THE TOWN OF ROCKY MOUNT UNDER 42 U.S.C. § 1988?

IV. IS 42 U.S.C. § 1988 UNCONSTITUTIONAL INASMUCH AS IT MAKES DEFENDANTS WHO INSTITUTE AND PERSIST IN LITIGATING FRIVOLOUS CIVIL RIGHTS CLAIMS LIABLE, AS A MATTER OF FEDERAL LAW, FOR THE ATTORNEYS' FEES OF THE DEFENDANTS HARASSED BY SUCH FRIVOLOUS SUITS?

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | (i) |
| TABLE OF CONTENTS | (iii) |
| TABLE OF AUTHORITIES | (vi) |
| OPINIONS BELOW | 1 |
| CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED | 2 |
| STATEMENT OF THE CASE | 6 |
| SUMMARY OF ARGUMENT | 7 |
| ARGUMENT | |
| I. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE TAX INJUNCTION ACT (28 U.S.C. § 1341) AND THE FEDERAL COMMON LAW PRINCIPLE OF COMITY DEPRIVED IT OF JURISDICTION TO ISSUE A MANDATORY INJUNCTION REQUIRING THE COUNTY BOARD OF SUPERVISORS TO EXTEND THE COUNTY'S UTILITY TAX TO AND COLLECT IT FROM THE INHABITANTS OF THE TOWN OF ROCKY MOUNT, VIRGINIA ON THE SAME BASIS AS IT APPLIES TO THE INHABITANTS OF THE COUNTY AT LARGE | 12 |
| A. *The Tax Injunction Act, 28 U.S.C. § 1341, Barred the District Court From Granting a Mandatory Injunction "Enjoining" the County's Board of Supervisors to* | |

*Extend the County's Utility Tax to and Collect it From the Inhabitants of the Town of Rocky Mount on the Same Basis as it Applies to the Inhabitants of the County at Large* ..... 12

B. *Even if the Tax Injunction Act Does Not Apply to a Petition for Mandatory Injunctive Relief, the District Court Properly Dismissed the Taxpayers' Complaint Under the Federal Common Law Principle of Comity* ..... 17

C. *The District Court and the Fourth Circuit Court of Appeals Correctly Held That the Laws of the Commonwealth of Virginia Provide a Plain, Speedy and Efficient Remedy for the Plaintiff Taxpayers to Challenge the Constitutionality of Virginia Tax Laws in the Courts of Virginia.* ..... 18

II. 42 U.S.C. § 1988 AUTHORIZED THE DISTRICT COURT, UPON DISMISSING THE TAXPAYERS' ACTION, TO AWARD ATTORNEYS' FEES AGAINST THE TAXPAYERS FOR INSTITUTING AND PERSISTING TO LITIGATE A FRIVOLOUS SUIT, AND THE DISTRICT COURT

DID NOT ABUSE ITS DISCRETION IN MAKING SUCH AN AWARD AGAINST THE TAXPAYERS IN THE INSTANT CASE ..... 25

III. 42 U.S.C. § 1988 AUTHORIZED THE DISTRICT COURT TO ORDER THE PLAINTIFF TAXPAYERS TO PAY THE ATTORNEYS' FEES INCURRED BY THE FRANKLIN COUNTY BOARD OF SUPERVISORS AND THE TOWN OF ROCKY MOUNT AS A RESULT OF THE PLAINTIFFS' FRIVOLOUS SUIT ..... 30

IV. 42 U.S.C. § 1988 IS CLEARLY CONSTITUTIONAL AS APPLIED BY THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THIS CASE .. 33

CONCLUSION..... 35

## TABLE OF AUTHORITIES


| | PAGE |
|---|---|
| *Appling County v. Municipal Electric Authority of Georgia,* 621 F.2d 1301 (5th Cir. 1980) .. | 28 |
| *Barber v. Kimbell's, Inc.,* 577 F.2d 216 n. 28 (4th Cir. 1978) ..... | 31 |
| *Bishop v. Wood,* 426 U.S. 345 (1976) ..... | 20 |
| *California v. Grace Brethren Church,* 457 U.S. 393 (1982) ..... | *Passim* |
| *Chesapeake and Potomac Telephone Co. of Virginia v. City of Newport News,* 194 Va. 413, 73 S.E.2d 394 (1952) ..... | 21,23 |
| *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412 (1978) ..... | *Passim* |
| *City of Staunton v. Mary Baldwin Seminary,* 39 S.E. 596 (Va. 1901) ..... | 22 |
| *Commonwealth v. Tredegar Co.,* 122 Va. 506, 95 S.E. 279 (1918) ..... | 22 |
| *Dawson v. Childs,* 665 F.2d 705 (5th Cir. 1982) ..... | 29 |
| *Erie Railway Co. v. Thompkins,* 304 U.S. 64 (1938) ..... | 34 |
| *Fair Assessment in Real Estate Association v. McNary,* 454 U.S. 100 (1981) ..... | *Passim* |
| *Goff v. Texas Instruments, Inc.,* 429 F. Supp. 973 (N.D. Tex. 1977) ..... | 33 |
| *Grubbs v. Butz,* 548 F.2d 973 (D.C. Cir. 1976) ..... | 31 |
| *Harbulak v. County of Suffolk,* 654 F.2d 194 (2nd Cir. 1981) ..... | 32 |

*Hargrave v. McKenney,* 413 F.2d 320 (5th Cir. 1969) ..... 28,29

*Hillsborough v. Cromwell,* 326 U.S. 620 (1946) ..... 20,23 24

*Huddleston v. Dwyer,* 322 U.S. 232 (1944)..... 20

*Hughes v. Rowe,* 449 U.S. 5 (1980)..... 25,33

*Hutcherson v. Board of Supervisors of Franklin County, Virginia,* 742 F.2d 142 (4th Cir. 1984)..... 20,22 28,31

*Hutcherson v. Board of Supervisors of Franklin County, Virginia,* No. 82-0377-R Civ., slip op. (W.D. Va. Jan. 10, 1983) ..... 26,31

*Johnson v. Black,* 103 Va. 477, 40 S.E. 633 (1905)..... 22

*Kane v. City of New York,* 468 F. Supp. 586 (S. D. N.Y. 1979) *aff'd* 614 F.2d 1288 (2nd Cir. 1979) ..... 32,33

*Matthews v. Rogers,* 284 U.S. 521 (1932)..... 18

*McDonald v. Thompson,* 305 U.S. 263 (1938), *reh'g denied,* 305 U.S. 676 (1939) ..... 14

*Moss v. Ward,* 434 F. Supp. 69 (S. D. N.Y. 1977) ..... 33,34

*Moton v. Lambert,* 508 F. Supp. 367 (N.D. Miss. 1981)..... 28,29

*Perez v. Ledesma,* 401 U.S. 82 (1971)..... 16

*Pulliam v. Allen,* ____ U.S. ____, 104 S. Ct. 1970 (1984) ..... 34,35

*Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981) ..... *Passim*

*Tully v. Griffin, Inc.*, 429 U.S. 68 (1976) ..... 13,15

*United Gas Pipeline Co. v. Whitman*, 595 F.2d 323 (5th Cir. 1979) ..... 29

*Werch v. City of Berlin*, 673 F.2d 192 (7th Cir. 1982) ..... 32,33

*White v. South Park Independent School District*, 693 F.2d 1163 (5th Cir. 1982) ..... 32

## CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. I ..... 2,34
U.S. Const. amend V ..... 2
U.S. Const. amend XIV, §1 ..... 2,18
28 U.S.C. § 1331 ..... 6
28 U.S.C. § 1341 ..... *Passim*
28 U.S.C. § 2101c ..... 6
28 U.S.C. § 2403a ..... 6
42 U.S.C. § 1983 ..... *Passim*
42 U.S.C. § 1988 ..... *Passim*
42 U.S.C. § 2000e-5(k) ..... 3,25
31
Va. Code § 8.01-270 (1984 Repl. Vol.) ..... 4,22
Va. Code § 58.1-3814 (1984 Repl. Vol.) (formerly § 58-617.2) ..... 4,13
26,27
Va. Code § 58.1-3984 (1984 Repl. Vol.) (formerly § 58-1145) ..... 6,21
22

## OTHER AUTHORITY

H. Black, *Black's Law Dictionary* (Rev. 4th Ed. 1968) ..... 14
H. R. Rep. No. 94-1558, 94th Cong., 2nd Sess. 7 (1976) ..... 32

No. 84-1057

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1984**

OPHUS A. HUTCHERSON, JR., et al,
Petitioners,

v.

BOARD OF SUPERVISORS OF
FRANKLIN COUNTY, VIRGINIA
and
TOWN OF ROCKY MOUNT, VIRGINIA,
Respondents.

---

# BRIEF IN OPPOSITION OF RESPONDENT, BOARD OF SUPERVISORS OF FRANKLIN COUNTY, TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

The Board of Supervisors of Franklin County, Virginia, by counsel, opposes the Petition for a Writ of *Certiorari* filed on behalf of Ophus A. Hutcherson, Jr., et al., to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 742 F.2d 142 (4th Cir. 1984). The Opinion on the denial of rehearing is not yet reported. The Orders and Opinions of the District Court were not published and are replicated in the Appendix to the Petition, beginning at A-13.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

*U.S. Const. amend. I:*
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*U.S. Const. amend V:*
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*U.S. Const. amend XIV, §1:*
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*28 U.S.C. § 1341:*
The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

*42 U.S.C. § 1983:*
Every person who, under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory

or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*42 U.S.C. § 1988:*

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

*42 U.S.C. § 2000e-5(k):*

In any action or proceeding under this title [42 USCS §§ 2000e et seq.] the court, in its discretion, may allow

the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

*Va. Code § 8.01-270 (1984 Repl. Vol.):*

No case shall be dismissed simply because it was brought on the wrong side of the court, but whenever it shall appear that a plaintiff has proceeded at law when he should have proceeded in equity, or in equity when he should have proceeded at law, the court shall direct a transfer to the proper forum, and shall order such change in, or amendment of, the pleadings as may be necessary to conform them to the proper practice; and, without such direction, any party to the suit or action shall have the right at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit or action was not brought on the right side of the court.

After any such amendment has been made, the case shall be placed by the clerk on the proper docket of the court and proceed and be determined upon such amended pleadings.

The defendant shall be allowed a reasonable time after such transfer in which to prepare the case for trial. (Code 1950, § 8-128; 1977, c. 617.)

*Va. Code § 58.1-3814 (1984 Repl. Vol.) (formerly § 58-617.2):*

A. Any county, city or town may impose a tax on the consumers of the utility service or services provided by any water or heat, light and power company or other corporations coming within the provisions of Chapter 16 (§ 58.1-2600 et seq.), which tax shall not be imposed at a rate in excess of twenty percent of the monthly amount charged to consumers of the utility service and shall not be applicable to any amount so charged in excess of fifteen dollars per month for residential customers. Any city, town or county that on July 1, 1972, imposed a utility consumer tax in excess of limits specified herein may continue to impose such a tax in excess of such limits, but no more.

B. Any tax enacted pursuant to the provisions of this section, or any change in a tax or structure already in existence, shall not be effective until sixty days subsequent to written notice by certified mail from the county, city or town imposing such tax or change thereto, to the registered agent of the utility corporation that is required to collect the tax.

C. Any county, city or town may impose a tax on the consumers of services provided within its jurisdiction by any electric and power, water or gas company owned by another municipality; provided, that no county shall be authorized under this section to impose a tax within a municipality on consumers of services provided by an electric light and power, water or gas company owned by the municipality. Any county tax imposed hereunder shall not apply within the limits of any incorporated town located within such county which town imposes a town tax on consumers of utility service or services provided by any corporation coming within the provisions of Chapter 26 (§ 58.1-2600 et seq.), provided that such town (i) provides police or fire protection, and water or sewer services, provided that any such town served by a sanitary district or service authority providing water or sewer services shall be deemed to be providing such water and sewer services itself, or (ii) constitutes a special school district and is operated as a special school district under a town school board of three members appointed by the town council.

Any municipality required to collect a tax imposed under authority of this section for another city or county or town shall be entitled to a reasonable fee for such collection.

D. In a consolidated county wherein a tier-city exists, any county tax imposed hereunder shall apply within the limits of any tier-city located in such county, as may be provided in the agreement or plan of consolidation, and such tier-city may impose a tier-city tax on the same consumers of utility service or services, provided that the combined county and tier-city rates do not exceed the maximum permitted by state law.

*Va. Code § 58.1-3984 (1984 Repl. Vol.) (formerly § 58-1145):*

A. Any person assessed with local taxes, aggrieved by any such assessment, may, unless otherwise specially provided by law, within three years from the last day of the tax year for which any such assessment is made, apply for relief to the circuit court of the county or city wherein such assessment was made. The application shall be before the court when it is filed in the clerk's office. In such proceeding the burden of proof shall be upon the taxpayer to show that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application, or that the assessment is otherwise invalid or illegal, but it shall not be necessary for the taxpayer to show that intentional, systematic and wilful discrimination has been made. The proceedings shall be conducted as an action at law before the court, sitting without a jury. The county or city attorney, or if none, the Commonwealth's attorney, shall defend the application.

B. In the event it comes or is brought to the attention of the commissioner of revenue of the locality that the assessment of any tax is improper or is based on obvious error and should be corrected in order that the ends of justice may be served, and he is not able to correct it under §58.1-3981, the commissioner of the revenue shall apply to the appropriate court, in the manner herein provided for relief of the taxpayers. Such application may include a petition for relief for any of several taxpayers.

The Tenth Amendment to the United States Constitution, 28 U.S.C. § 1331, 28 U.S.C. § 2101(c) and 28 U.S.C. § 2403(a) are also relied upon by the Petitioners and are reprinted in the Appendix attached to their Petition.

## STATEMENT OF THE CASE

Petitioners' statement of the case is adequate except to the extent that it fails to state that, effective

January 1, 1985, Title 58 of the Code of Virginia was repealed in its entirety and replaced by new Title 58.1. However, §§ 58-617.2 and 58-1145, at issue herein, were carried forward into new Title 58.1 as §§ 58.1-3814 and 58.1-3984, respectively, without change as to any provisions of such Sections which are relevant to the issues at hand.

## SUMMARY OF ARGUMENT

The issues of federal law raised by the Petitioners have been adequately addressed in prior decisions of this Court, which decisions were correctly applied by the District Court and the Fourth Circuit Court of Appeals herein. Accordingly, the Court should decline to grant a writ of *certiorari* in the instant case.

Both of the lower courts herein concluded that the District Court lacked jurisdiction over the Taxpayers' suit for injunctive and declaratory relief and damages based upon 28 U.S.C. § 1341 (the Tax Injunction Act) (hereinafter "the Act") and the federal common law principle of comity, since the Taxpayers have an opportunity for a full hearing and judicial determination in the courts of Virginia on the constitutionality of the Virginia taxing statute in question. The Taxpayers have apparently conceded that if an adequate remedy is provided by Virginia law, the lower courts did not err in declining to assert jurisdiction over the Taxpayers' petition for declaratory and prohibitive injunctive relief and damages. They assert, however, that the District Court had jurisdiction to grant them mandatory injunctive relief from the allegedly unconstitutional Virginia taxing statute, notwithstanding the availability of an adequate remedy in Virginia courts. The clear language of the Act itself and the recent decisions of this Court render such an argument frivolous.

The Act states that a district court "shall not enjoin, suspend, or restrain the assessment, levy or collection..." of any state tax where an adequate state remedy is provided. The Taxpayers' claim that mandatory injunctions are not prohibited by the Act necessarily requires that the term "enjoin" means the same as the term "restrain". Such a construction of the Act ignores the established rule of this Court that each word in a statute must be construed to have meaning unless redundancy was clearly intended by the legislature, and fails to explain why the generally accepted usage of the word "enjoin" to refer to mandatory injunctive relief should not apply under the Act. Indeed, the Taxpayers themselves used the term "enjoin" in its mandatory sense in their petition for mandatory injunctive relief.

This Court has stated that the Act has as its basis the federal common law principle of comity, under which federal courts deny equitable relief from allegedly unconstitutional state taxing statutes, provided an adequate state remedy exists for a plaintiff to challenge such a statute. The concern in such a case is that state tax administration might be thrown into disarray during the pendancy of the federal suit and that the states' status as independent sovereigns would be unduly threatened thereby. It was against this background that the Act was adopted, which this Court has characterized as an attempt by Congress to drastically limit federal district court jurisdiction to interfere with so an important a local concern as the collection of taxes.

This strong policy of judicial abstention as expressed in the Act led this Court to rule in 1982 that the Act impliedly bars declaratory relief from allegedly unconstitutional state laws. The Court reasoned that Congress surely would not have intended to prohibit taxpayers from seeking one form of anticipatory relief from

allegedly unconstitutional state tax laws while permitting them to seek another form of relief, since to permit such would defeat the purpose of the Act to drastically limit federal court jurisdiction in the area of state tax administration.

In the face of these decisions by this Court, the Taxpayers take the position that mandatory injunctive relief from allegedly unconstitutional state tax laws is not barred by the Act even where an adequate state remedy exists. The lower courts in the case at bar correctly characterized such a contention as frivolous and without merit.

The frivolousness of the Taxpayers' position in the case at bar is made even more apparent by the fact that even if the Act is inapposite to their claim, the federal common law doctrine of comity would deprive the District Court of jurisdiction. This Court ruled in 1981 that the doctrine of comity survived the passage of the Act in 1937, and bars § 1983 actions challenging the constitutionality of state taxing statutes whenever the remedies afforded by the state in question would qualify as adequate under the Act. The Court reasoned that an adjudication by a federal court that a state taxing statute was unconstitutional would represent an intrusion prohibited under the principle of comity. The recognition of the disruptive effect of such an adjudication upon a state's administration of its tax system was again expressly recognized by the Court a year later when it held that the Act impliedly barred declaratory relief, as discussed above.

Based upon the foregoing, the District Court examined the remedies afforded the Taxpayers by Virginia law, and found them to be adequate under the decisions of this Court since the Taxpayers were afforded an opportunity for a full hearing and adjudication of

their constitutional claims. This interpretation of Virginia law by both lower federal courts is entitled to great deference by this Court, since both of these courts sit in Virginia and are familiar with the intricacies of local practice. It has long been the rule of this Court that it will uphold the lower federal courts' interpretations of state law in such a case unless such interpretations are clearly wrong.

The lower courts in the case at bar were correct in ruling that Title 58 of the Code of Virginia provides the Taxpayers with an adequate remedy, since the Virginia Supreme Court has held that Title 58 affords taxpayers with an opportunity to litigate the constitutionality of Virginia's taxing statutes. But even if Title 58 did not provide the Taxpayers with an adequate remedy within the meaning of the Act, the Court of Appeals concluded that a Virginia trial court would certainly provide the Taxpayers with a full adjudication of their constitutional claims as an exercise of such court's equitable jurisdiction.

Furthermore, the Court of Appeals correctly noted that if the Taxpayers filed an action on the law side of a Virginia trial court's docket in reliance upon Title 58 and such was found to be inapposite to their claims, or filed an action under the court's general equitable jurisdiction and an adequate remedy at law was determined to exist under Title 58, then the Code of Virginia would require the trial court to transfer the Taxpayers' suit to the appropriate side of its docket. The Code of Virginia prohibits a court from dismissing a case merely because it is filed as a law action rather than a petition for equitable relief, or *vice versa.*

Based upon the foregoing, it is apparent that the District Court acted within its discretion in ordering the Taxpayers to pay the Defendants' attorneys' fees under 42 U.S.C. § 1988. This Court has held that plaintiffs

who institute meritless or frivolous civil rights actions, or who persist in litigating the same after the frivolousness of such becomes apparent, may be ordered to pay the reasonable attorney's fees of the defendants subjected to such action. The trial judge, after carefully observing the demeanor of the parties and the merits of their respective cases, concluded as a matter of fact and law that the Taxpayers' had persisted in litigating a claim which the Statutes of the United States and the cases of this Court rendered meritless and frivolous.

The Taxpayers' litigiousness in the instant case is made no less frivolous by their purported reliance upon Fifth Circuit cases holding that mandatory injunctive relief is not barred by the Act. These Fifth Circuit cases antedate the decisions of this Court discussed above, and were decided under the erroneous premise that the Act was an exception to federal court jurisdiction which should be construed narrowly. The Taxpayers' purported reliance upon these early Fifth Circuit cases in filing their suit and persisting to litigate their claim in disregard for the decisions of this Court aforesaid can only be characterized as frivolous. Indeed, based upon a case decided by the Fifth Circuit four months prior to the filing of the Taxpayers' suit herein, it would appear that even the Fifth Circuit has rejected the reasoning of its earlier cases, ruling instead that the Act is to be given a broad interpretation.

The award of attorneys' fees in the instant case effects the intent of Congress in § 1988 to deter the institution of frivolous civil rights suits. Only the United States is expressly barred from recovering attorney's fees under § 1988, and the legislative history of § 1988 establishes that Congress intended attorney's fees to be awarded to all other prevailing parties, including state governmental entities.

This Court has determined that prevailing defendants may recover attorney's fees against civil rights plaintiffs, including pro se plaintiffs, only where frivolous suits have been brought. Such a strict standard, conscientiously applied by lower federal courts as in the case at bar, adequately ensures that plaintiffs will not be deterred from bringing meritorious civil rights suits for fear of an award of attorney's fees against them.

The District Court was correct in dismissing the Taxpayers' suit in the case at bar since Virginia law provides them with an opportunity for a full hearing and judicial determination of their constitutional claims, and the Court did not abuse its discretion in awarding attorney's fees to the Defendants pursuant to § 1988. Accordingly, this Court should decline to issue a writ of *certiorari* in this case.

## ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE TAX INJUNCTION ACT (28 U.S.C. § 1341) AND THE FEDERAL COMMON LAW PRINCIPLE OF COMITY DEPRIVED IT OF JURISDICTION TO ISSUE A MANDATORY INJUNCTION REQUIRING THE COUNTY BOARD OF SUPERVISORS TO EXTEND THE COUNTY'S UTILITY TAX TO AND COLLECT IT FROM THE INHABITANTS OF THE TOWN OF ROCKY MOUNT, VIRGINIA ON THE SAME BASIS AS IT APPLIES TO THE INHABITANTS OF THE COUNTY AT LARGE.

A. *The Tax Injunction Act, 28 U.S.C. § 1341, Barred the District Court From Granting a Mandatory Injunction "Enjoining" the County's Board of Supervisors to Extend*

*the County's Utility Tax to and Collect it From the Inhabitants of the Town of Rocky Mount on the Same Basis as it Applies to the Inhabitants of the County at Large.*

The Taxpayers have conceded that the District Court lacked jurisdiction by virtue of 28 U.S.C. § 1341 and *Fair Assessment in Real Estate Association v. McNary,* 454 U.S. 100 (1981), to declare the Virginia taxing statute unconstitutional and to award them prohibitory injunctive relief and money damages, provided that an adequate Virginia remedy is available to them. The Taxpayers claim, however, that the District Court had jurisdiction to declare the Virginia taxing statute unconstitutional and to issue a mandatory injunction to remedy such alleged defect.

The District Court properly dismissed the Taxpayers' Petition for an Order declaring § 58-617.2 of the Code of Virginia (subsequently amended as § 58.1-3814) unconstitutional and "enjoining the County Board of Supervisors to extend the County's utility tax to and collect it from the inhabitants of the Town [of Rocky Mount] on the same basis as it applies to the inhabitants of the County at large". That this is the correct result is made clear by the express provisions of the Tax Injunction Act, 28 U.S.C. § 1341 (hereinafter "the Act") itself, as well as the decisions of this Court construing the Act.

It has long been recognized that "[a] federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost". *Tully v. Griffin, Inc.,* 429 U.S. 68, 73 (1976). This policy of restraint is clearly reflected and confirmed in the congressional command of the Act that "the

district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state". 28 U.S.C. § 1341.

The Taxpayers' claim that a mandatory injunction to require collection of additional taxes is not within the prohibition of the Act necessarily requires that "enjoin" be given the same meaning as "restrain". Such a construction would ignore the "rule that all words of a statute are to be taken into account and given effect if that can be done consistently with the plainly disclosed legislative intent", *McDonald v. Thompson,* 305 U.S. 263, 266 (1938), *reh'g denied,* 305 U.S. 676 (1939), and would also be contrary to the general meaning assigned to the word "enjoin". For instance, "enjoin" is defined as follows in H. Black, *Black's Law Dictionary* (Rev. 4th Ed. 1968):

> To require; command; positively direct. To require a person, by writ of injunction from a court of equity, to perform, or to abstain or desist from, some act.

(Citations omitted). Indeed, the word "enjoin" is used in precisely this mandatory sense in paragraph 6 of the prayer of the Taxpayers' Amended Petition, wherein it is stated:

> That accordingly the court issue its order ENJOINING the County Board of Supervisors to extend the County's utility tax to and collect it from the inhabitants of the town on the same basis as it applies to the inhabitants of the County at large (Plaintiffs' Class);

(emphasis supplied).

In addition to the express language of the Act itself, the decisions of this Court construing the Act

establish that the District Court was correct in dismissing the Taxpayers' Petition for a mandatory injunction. This Court has stated that:

> The statute 'has its roots in equity practice, in principles of federalism and in recognition of the imperative need of a State to administer its own fiscal operations.' *Tully v. Griffin, Inc.*, 429 U.S. at 73, 50 L. Ed. 2d 227, 97 S. Ct. 219. This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes. 81 Cong. Rec. 1415 (1937) (remarks of Sen. Bone)....

*Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981) (footnote omitted).

The court in *Rosewell* held that taxpayers could not challenge the assessment of real estate taxes in the federal court system without having first exhausted the remedies within the state court procedures. The court reasoned that:

> If federal injunctive relief were available, 'state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like questions of state regulatory law, are more properly heard in the state courts.'

*Id.* at 527, (quoting *Perez v. Ledesma,* 401 U.S. 82, 128 n. 17 (1971). The Court concluded that "the reasons supporting federal noninterference are just as compelling today as they were in 1937 [the year in which 28 U.S.C. § 1341 was enacted]". *Id.*

It was this strong policy of federal noninterference with state tax systems which led the Court in *California v. Grace Brethren Church,* 457 U.S. 393 (1982), to hold that the Act divests district courts of jurisdiction to grant declaratory relief from allegedly unconstitutional state tax laws. The Court reasoned that there is little practical difference between injunctive and declaratory relief, and stated:

> WE WOULD BE HARD PRESSED TO CONCLUDE THAT CONGRESS INTENDED TO PROHIBIT TAXPAYERS FROM SEEKING ONE FORM OF ANTICIPATORY RELIEF AGAINST STATE TAX OFFICIALS IN FEDERAL COURT, WHILE PERMITTING THEM TO SEEK ANOTHER, thereby defeating the principal purpose of the Tax Injunction Act: 'to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.' (Citations omitted)

*Id.* at 408 (emphasis supplied). Furthermore, the Court stated that "the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration". *Id.* at 409 n. 22.

The rationale of *Grace Brethren Church* is controlling in the case at bar. Surely Congress did not intend to allow a federal district court to declare a state tax law to be unconstitutional and issue a mandatory

injunction requiring such state to expand the class of taxpayers subject to the tax, where it has forbidden prohibitory injunctive relief as well as declaratory relief as being too intrusive upon the States as independent sovereigns.

Indeed, as this Court concluded in *McNary,* 454 U.S. 100, 113 (1981), the principles supporting federal noninterference with state tax laws are violated by an adjudication by a federal court that such state tax law is unconstitutional, regardless of the nature of relief requested of the court. Accordingly, the Court in *McNary* held that taxpayer suits under 42 U.S.C. § 1983 are barred by the federal common law principle of comity where the taxpayer has an adequate remedy in the courts of such state.

The express language of the Act and the cases of this Court construing it establish that the lower courts correctly applied the Act to the case at bar. Furthermore, the District Court properly dismissed the Taxpayers' suit since the laws of the State of Virginia provide the Taxpayers with a plain, speedy and efficient remedy in the courts of Virginia.

B. *Even if the Tax Injunction Act Does Not Apply to a Petition for Mandatory Injunctive Relief, the District Court Properly Dismissed the Taxpayers' Complaint Under the Federal Common Law Principle of Comity.*

Even if mandatory injunctions are not within the prohibitive language of the Act, the federal common law principle of comity barred the District Court from asserting jurisdiction over the case at bar. It has long been established that:

> [M]ere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States. If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question is involved . . . .

*Matthews v. Rogers,* 284 U.S. 521, 525-26 (1932).

In *McNary,* 454 U.S. at 108, this Court held that the principle of comity expressed in *Matthews* survived the passage of the Tax Injunction Act in 1937, and has application today to suits which would cause disruption of a state's revenue collection system but which may not be covered by the Act. Accordingly, the Court held "that taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts . . ., provided of course that those remedies [provided by the state] are plain, adequate and complete . . . ." *Id.* at 116. The Court held that "plain, adequate and complete" means the same as "plain, speedy and efficient" within the meaning of the Tax Injunction Act. *Id.* at 116 n. 8.

Accordingly, the Taxpayers' suit for injunctive relief based upon § 1983 and the Fourteenth Amendment of the United States Constitution was properly dismissed by the District Court, since the remedies afforded the taxpayers in Virginia courts are plain, speedy and efficient within the meaning of the Act.

### C. *The District Court and the Fourth Circuit Court of Appeals Correctly Held That the Laws of the Commonwealth of Virginia Provide a Plain, Speedy and Efficient Remedy for the Plaintiff Taxpayers to*

*Challenge the Constitutionality of Virginia Tax Laws in the Courts of Virginia.*

Under both the Tax Injunction Act and the principle of comity, the District Court lacked jurisdiction over the Taxpayers' suit in the case at bar, since the laws of the Commonwealth of Virginia provide a plain, speedy and efficient remedy by which the Taxpayers may challenge the constitutionality of the Virginia taxing statute.

This Court has stated that under the Act, the state remedy must meet certain minimal procedural criteria to qualify as a plain, speedy and efficient remedy. *Rosewell,* 450 U.S. at 512. In determining the minimal procedural criteria, the Court has been mindful that "[i]n order to accommodate these concerns [for comity] and be faithful to the Congressional intent 'to limit drastically' federal-court interference with state tax systems, we must construe narrowly the 'plain, speedy and efficient' exception to [federal court abstention as required by] the Tax Injunction Act". *Grace Brethren Church,* 457 U.S. at 413. Accordingly, this Court has held that a plain, speedy and efficient remedy is afforded by a state where it "provides the taxpayer with a 'full hearing and judicial determination' at which . . . the taxpayer may raise any and all constitutional objections to the tax". *Rosewell* at 514. This standard applies also to cases governed by the principle of comity. *McNary,* 454 U.S. at 116 n. 8.

Both the District Court and the Court of Appeals concluded that Virginia law provides the Taxpayers with an opportunity for a full hearing and judicial determination of all of the Taxpayers' constitutional objections to the Virginia taxing statute. As stated by the Court of Appeals, "it is certain that a bill in equity in the Virginia courts would lie to correct the complaint of the

plaintiffs" in the event that an adequate remedy at law did not exist. *Hutcherson v. Board of Supervisors of Franklin County, Virginia,* 742 F.2d 145 (4th Cir. 1984). However, the Court of Appeals concluded that an adequate remedy at law would be available to the Taxpayers in Virginia courts in light of the broad construction which has been given to the relevant Virginia statutes by the Virginia Supreme Court. *Id.*

It is well established that the rulings by the District Court and the Court of Appeals that Virginia law affords the Taxpayers an opportunity for a full hearing and judicial determination on any and all constitutional objections to the Virginia taxing statute are entitled to great deference by this Court, since both of these courts sit in the Commonwealth of Virginia. As stated by the Court in *Hillsborough v. Cromwell,* 326 U.S. 620, 629-30 (1946), quoting *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944), "[o]n such questions [of local law] we pay great deference to those courts 'who are familiar with the intricacies and trends of local law and practice'". *See also, Bishop v. Wood,* 426 U.S. 345 (1976) (relying on district court judge's expertise regarding the law of the state in which he sits, even though a contrary construction of the city ordinance in issue was quite tenable). Due to the recognized expertise of the lower federal judges in such a case involving state law, "this court has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state law issue without such guidance might have justified a different conclusion". *Id.* at 346.

Even if such a deferential standard of review did not apply, the conclusions of the lower courts that Virginia law affords the Taxpayers a state forum in which to fully litigate their constitutional challenges to

the Virginia taxing statute are entitled to be affirmed by this Court. A remedy at law is afforded the Taxpayers by Va. Code § 58.1-3984 (1984 Repl. Vol.) (formerly § 58-1145). The Virginia Supreme Court has stated with reference to this Section and other provisions of the Code related thereto, that "[t]he object of these statutes was to furnish an expeditious and inexpensive remedy against taxes which have been assessed or collected . . . [and] [t]hey are to be liberally construed in order to further the remedy so provided". *Chesapeake and Potomac Telephone Co. of Virginia v. City of Newport News,* 194 Va. 409, 413, 73 S.E.2d 394, 397 (1952). Accordingly, it has long been established in Virginia that "[r]elief under these statutes is not confined to the correction of an assessment which is merely erroneous . . ., [and instead] [t]hey embrace also levies and assessments claimed to be unconstitutional, illegal and void". *Id.*

The Taxpayers' argument that § 58.1-3984 has no application to the case at bar is without merit. The Taxpayers concede that a taxpayer is "aggrieved by any such assessment" within the meaning of this Section when one wishes to challenge the amount of money to be paid by the taxpayer under the state taxing statute in issue. The very premise of the Taxpayers' suit in this case, albeit one which is constitutionally infirm, is that the amount of tax which their class was required to pay to provide funding for a 20% increase in the salaries of teachers employed by the County was inflated by the County's failure to levy such tax against the citizens of the Town of Rocky Mount.

Furthermore, that a class action is permitted by this Section is clear from its statement that "[s]uch application may include a petition for relief for any of several Taxpayers". Va. Code § 58.1-3984 (1984 Repl. Vol.).

§ 58.1-3984 provides taxpayers with even more protection than is required to meet the minimal procedural criteria set forth by this Court in order to qualify as a plain, speedy and efficient state remedy. Unlike the state statutes which were upheld in *Rosewell National Bank,* 450 U.S. 503, and *Grace Brethren Church,* 457 U.S. 393, Va. Code § 58.1-3984 does not limit the remedies of a disgruntled taxpayer to a suit for a refund. Instead, a Virginia taxpayer may challenge the validity of a tax levied upon him prior to paying such tax.

Even if § 58.1-3984 has no application to the case at bar, the Court of Appeals was correct in stating that, in that event, "it is certain that a bill in equity in the Virginia courts would lie to correct the complaint of the plaintiffs". *Hutcherson,* 742 F.2d at 145. The relief granted by a court of equity is complete relief, and it has been long settled in Virginia that injunctive relief is available in a court of equity for a taxpayer subject to the collection of an illegal tax, unless there is an adequate remedy at law. *See, Commonwealth v. Tredegar Co.,* 122 Va. 506, 95 S.E. 279 (1918); *City of Staunton v. Mary Baldwin Seminary,* 39 S.E. 596 (Va. 1901).

Furthermore, Virginia has allowed taxpayers to seek class relief in its courts of equity. *See, Johnson v. Black,* 103 Va. 477, 40 S.E. 633 (1905).

The Taxpayers' remedy in the courts of Virginia is not made inadequate by the possibility that a Virginia court might decline to exercise its equitable jurisdiction because an adequate remedy existed at law, or *vice versa,* since the Taxpayers' suit would not be dismissed but would simply be transferred to the appropriate side of the trial court's docket. *Hutcherson,* 742 F.2d at 145. This result is mandated by Va. Code § 8.01-270 (1984

Repl. Vol.), which states, in part, that "[n]o case shall be dismissed simply because it was brought on the wrong side of the court, but whenever it shall appear that a plaintiff has proceeded at law when he should have proceeded in equity, or in equity when he should have proceeded at law, the court SHALL direct a transfer to the proper forum". (Emphasis supplied). This Section is mandatory, not discretionary. *Chesapeake and Potomac Telephone Co. of Virginia,* 194 Va. at 417, 73 S.E.2d at 399.

The Taxpayers' claim that the District Court had jurisdiction in the case at bar, notwithstanding the Virginia remedies discussed aforesaid, because of this Court's statement in *Hillsborough,* 326 U.S. at 623, that "[t]he constitutional requirement, however, is not satisfied if a state does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class". Petition at p. 18.

An examination of this statement in the context in which it was made by the Court reveals that the Taxpayers' reliance upon it is erroneous. The case involved a suit for declaratory judgment to have certain assessments on tangible personal property owned by the plaintiff taxpayer declared null and void, claiming that the taxing authorities had consistently and intentionally subjected the taxpayer to discriminatory treatment by assessing her property higher than that of the other members of her class. The court determined that a taxpayer's remedy under New Jersey law "is restricted to proceedings AGAINST OTHER MEMBERS OF HIS CLASS FOR THE PURPOSE OF HAVING THEIR TAXES INCREASED" by increasing the value assigned to their property. *Hillsborough,* 326 U.S. at 624 (emphasis supplied).

In contrast, Virginia law allows the Taxpayers to institute an action directly against the taxing authority in question and to obtain a full adjudication of all alleged constitutional defects in the taxing statute. Under *Rosewell* and progeny, this Court has established that such an opportunity to fully and fairly litigate the Taxpayers' constitutional claims in state court denied the District Court of jurisdiction over the Taxpayers' action.

Moreover, if *Hillsborough* were applied in the manner urged by the Taxpayers, state remedies afforded taxpayers would be inadequate under the Act whenever a state failed to *sua sponte* declare its own taxing statute unconstitutional, since its failure to do so places the "burden" upon taxpayers to file suit to correct the alleged constitutional defects. Such a construction of the Act renders it nugatory.

The Taxpayers also urge that the Virginia remedies afforded them are inadequate because of the likelihood, in their opinion, that a Virginia court would find their claims to be meritless. Petition at p. 16-17. Such an argument was expressly rejected in *Grace Brethren Church,* 457 U.S. at 417 n. 37, wherein the Court stated that "[w]e also reject the appellees' argument to the extent that it assumes that the state courts will not protect their constitutional rights . . ., [for] [s]tate courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law". (Citations omitted).

It is clear, therefore, that the Taxpayers have a remedy in the Virginia court system which is "plain, speedy and efficient" within the meaning of 28 U.S.C. § 1341 and the principle of comity to address their claims that the Virginia tax statute is unconstitutional. The dismissal of this case by the District Court was

proper, and its prosecution in the District Court to begin with was frivolous and without merit.

## II. 42 U.S.C. § 1988 AUTHORIZED THE DISTRICT COURT, UPON DISMISSING THE TAXPAYERS' ACTION, TO AWARD ATTORNEYS' FEES AGAINST THE TAXPAYERS FOR INSTITUTING AND PERSISTING TO LITIGATE A FRIVOLOUS SUIT, AND THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN MAKING SUCH AN AWARD AGAINST THE TAXPAYERS IN THE INSTANT CASE.

The Court of Appeals was correct in ruling that the District Court did not abuse its discretion in awarding attorneys' fees against the Taxpayers in the instant case pursuant to 42 U.S.C. § 1988. This Section provides, in part, that "[i]n any action or proceeding to enforce a provision of . . . [42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs". *Id.*

Attorney's fees may be awarded in favor of a prevailing defendant where a court finds that the plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so". *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 422 (1978) (applying 42 U.S.C. § 2000e-5(k), the relevant language of which is identical to that of § 1988, to an action brought under Title VII of the Civil Rights Act of 1964). The *Christiansburg Garment Co.* standard applies to awards of attorney's fees under § 1988. *Hughes v. Rowe,* 449 U.S. 5 (1980).

The District Court in the case at bar found "as a matter of fact and as a matter of law that the Plaintiff's [sic] action was frivolous" within the meaning of

*Christiansburg Garment Co.*, reasoning that:

> Any fair reading of the statute [the Tax Injunction Act] and the Supreme Court cases interpreting it clearly instructs that a United States District Court may not entertain an action which in any way challenges the state's levying and collecting of taxes where the state provides a speedy and efficient procedure for challenging such actions. Virginia clearly provides such a procedure.

*Hutcherson v. Board of Supervisors of Franklin County, Virginia*, No. 82-0377-R Civ., slip op. at 2-3 (W.D. Va., Jan. 10, 1983). The Court of Appeals properly affirmed the District Court's award of attorneys' fees in the instant case since the Taxpayers' claim was frivolous, unreasonable, and groundless and the Taxpayers persisted in pressing their claims after the frivolousness of such became apparent.

The Taxpayers filed their "petition for declaratory judgment and injunctive relief" in the District Court on May 25, 1982, asking the Court to declare Va. Code § 58-617.2 unconstitutional and to issue an order "enjoining" the Franklin County Board of Supervisors to "abate or remove its utility tax as presently applied", or to "extend its application to the residents and utility customers of the Town of Rocky Mount".

Any fair reading of the Act and the cases of this Court would have apprised the Taxpayers that their § 1983 suit in the District Court was meritless. On December 1, 1981, this Court held that "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts . . ., provided of course that those remedies [provided in state court] are plain, adequate and complete". *McNary,* 454 U.S. at 116. Furthermore, the

District Court clearly lacked jurisdiction over the Taxpayers' prayer for injunctive relief by virtue of the express provisions of the Tax Injunction Act, 28 U.S.C. § 1341, which was enacted in 1937. Moreover, on June 18, 1982, this Court decided *Grace Brethren Church,* 457 U.S. 393, which holds that the Tax Injunction Act deprives district courts of jurisdiction to grant declaratory relief from state tax laws where there is an adequate state remedy within the meaning of the Act.

Taxpayers in the case at bar thus sought to do that which is expressly prohibited. They sought injunctive and declaratory relief from an allegedly unconstitutional state tax law where the state in question, Virginia, afforded the Taxpayers a plain, speedy and efficient remedy within the meaning of the Act. In response to the Defendants' motion to dismiss, the Taxpayers persisted in pursuing their frivolous action by seeking leave to amend their complaint, which leave was granted on July 29, 1982.

The amended complaint retained the prayer of the original complaint that the District Court declare Va. Code § 58-617.2 unconstitutional. It deleted the prayer of the original complaint that the defendant Board of Supervisors be ordered to "abate or remove its utility tax", and prayed that the Court "issue its order enjoining the County Board of Supervisors to extend the County's utility tax to and collect it from the inhabitants of the town on the same basis as it applied to the inhabitants of the county at large". In utter disregard for *McNary,* 454 U.S. at 116, the amended complaint also introduced a claim for compensatory and punitive damages against the Board of Supervisors "as authorized by 42 U.S.C. § 1983, for violations of the civil rights of the Plaintiffs".

From the foregoing, it is clear that the Taxpayers' suit for injunctive relief and damages was meritless

under the settled principles of law existing before the filing of their complaint, and their claim for damages was barred by *McNary* over one year before the amended complaint was filed in the District Court. The District Court and Court of Appeals were correct in ruling that attorneys' fees were available to the defendants under 42 U.S.C. § 1988. As stated by the Court of Appeals:

> In light of the settled principles of law existing before the filing of this action and handed down during the action, all before the hearing in the district court, we conclude that the plaintiffs' suit is meritless within the meaning of *Christiansburg Garment Co.*, in that it is unreasonable or groundless and that the plaintiffs continued to litigate after it clearly became so. *Christiansburg Garment Co.*, at 422.

*Hutcherson,* 742 F.2d at 146.

In spite of the express language of the Tax Injunction Act and the rulings of this Court which are dispositive of the Taxpayers' suit, the Taxpayers' claim that attorneys' fees should not be awarded against them. They claim that such an award is barred by their purported reliance upon several early cases decided in the Fifth Circuit which hold that a mandatory injunction requiring the collection of additional taxes does not "enjoin, suspend or restrain, the assessment, levy or collection" of state taxes within the meaning of the Tax Injunction Act. This position is without merit.

The most recent case cited by the Taxpayers in support of their position is *Moton v. Lambert,* 508 F. Supp. 367 (N.D. Miss. 1981), which relies upon the authority of *Appling County v. Municipal Electric Authority of Georgia,* 621 F.2d 1301 (5th Cir. 1980) and *Hargrave v. McKenney,* 413 F.2d 320 (5th Cir. 1969). The fundamental premise of this line of cases is that

"[e]ncroachments on the federal judiciary's power to vindicate rights allegedly guaranteed by the constitution must be construed narrowly". *Hargrave,* 413 F.2d at 326.

Accordingly, the premise of *Moton* and its predecessors cannot survive the subsequent conclusions of this Court that "this legislation [the Tax Injunction Act] was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes". *Rosewell,* 450 U.S. at 522. Indeed, the Fifth Circuit has apparently so concluded in *Dawson v. Childs,* 665 F.2d 705, 709 (5th Cir. 1982), wherein it is stated that "[t]he concept that section 1341 is not a narrow statute aimed only at injunctive interference with tax collection, but is rather a broad restriction on federal jurisdiction in suits that impede state tax administration, has continued to gain credence in the federal courts". (quoting, *United Gas Pipeline Co. v. Whitman,* 595 F.2d 323 (5th Cir. 1979). After so stating, the court applied a "broad reading" of the Act and held, *inter alia*, that the Act deprives district courts of jurisdiction over an action to enjoin a tax lien. *Id.* at 710. This latter case was decided on January 14, 1982, four months prior to the filing of the Taxpayers' suit herein.

Moreover, each of these Fifth Circuit cases antedate *Grace Brethren Church,* 457 U.S. at 409 n. 22, wherein the court stated that "the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration". The Taxpayers have ignored the conclusion of the Court that:

> [W]e would be hard pressed to conclude that Congress intended to prohibit tax-

> payers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act: 'to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes'.

*Id.* at 408 (citations omitted).

The Taxpayers' purported reliance upon the Fifth Circuit cases aforesaid is rendered even more unreasonable in light of the fact that such decisions antedate the conclusion of *McNary,* 454 U.S. at 113, that a determination by a federal court that a state taxing statute is unconstitutional would be as fully intrusive and disruptive of the state system as actions for equitable relief barred by the Act and the principle of comity. Upon so concluding, the court held that federal district courts lack jurisdiction to entertain actions for damages under § 1983 where there is an adequate state remedy afforded such claims.

The foregoing establishes that the Taxpayers' claims in the case at bar are "frivolous" within the meaning of *Christiansburg Garment Co.,* 434 U.S. 412, and that the Court of Appeals was correct in ruling that the award of attorneys' fees against the Taxpayers was not an abuse of discretion by the District Court.

## III. 42 U.S.C. § 1988 AUTHORIZED THE DISTRICT COURT TO ORDER THE PLAINTIFF TAXPAYERS TO PAY THE ATTORNEYS' FEES INCURRED BY THE FRANKLIN COUNTY BOARD OF SUPERVISORS AND THE TOWN OF ROCKY MOUNT AS A RESULT OF THE PLAINTIFFS' FRIVOLOUS SUIT.

The Taxpayers' claim that attorneys' fees cannot be awarded against the Taxpayers themselves in favor of the Franklin County Board of Supervisors and the Town of Rocky Mount is without merit.

After careful observation of the demeanor of the parties and the merits of their respective cases, the District Court concluded "as a matter of fact and as a matter of law that the Plaintiff's [sic] action was frivolous". *Hutcherson,* No. 82-0377-R Civ., slip op. at 2. The Court of Appeals affirmed this finding of the District Court, stating that:

> In light of the settled principles of law existing before the filing of this action and handed down during the action, all before the hearing in the district court, we conclude that the plaintiffs' suit is meritless within the meaning of *Christiansburg Garment Co.,* in that it is unreasonable and groundless and that the plaintiffs continued to litigate after it clearly became so. *Christiansburg Garment Co.,* at 422.

*Hutcherson,* 742 F.2d at 146.

Furthermore, the Court of Appeals found that the district court did not abuse its discretion either in the award of attorneys' fees or in the amount thereof, stating that "[t]he district court, having found that plaintiffs' action was frivolous as a matter of fact of law, was ever so careful in its assessment of attorneys' fees". *Id.* As noted by the Court of Appeals, the District Court required affidavits showing literal item-by-item compliance with the twelve criteria established by *Barber v. Kimbell's, Inc.,* 577 F.2d 216, 226 n. 28 (4th Cir. 1978).

This Court has recognized the importance which Congress placed upon the availability of attorneys' fees to defendants in civil rights cases. With reference to 42 U.S.C. § 2000e-5(k), the relevant terms of which are

substantially identical to those of § 1988, the Court concluded that while Congress desired to make it easier for plaintiffs of limited means to bring a meritorious suit, "equally important, Congress intended to 'deter the bringing of lawsuits without foundation' by providing that the 'prevailing party' — be it plaintiff or defendant — could obtain legal fees". *Christiansburg Garment Co.,* 434 U.S. at 420, quoting, *Grubbs v. Butz,* 548 F.2d 973, 975 (D.C. Cir. 1976).

The Congressional desire to deter the bringing of meritless and frivolous civil rights actions becomes no less important when the defendants are governmental entitites rather than private individuals. Indeed, that Congress intended the Defendants in the instant case to be eligible to recover attorneys' fees incurred in defending a frivolous suit is made clear by the legislative history of the Act, *see, e.g.,* H. R. Rep. No. 94-1558, 94th Cong., 2nd Sess. 7 (1976), and by the fact that Congress excepted only the United States from the class of litigants entitled to an award as a "prevailing party" under § 1988. Accordingly, the other Courts of Appeals have not refused to award prevailing governmental defendants attorneys' fees under § 1988 where such defendants were subjected to frivolous civil rights suits. *See, Werch v. City of Berlin,* 673 F.2d 192 (7th Cir. 1982); *Kane v. City of New York,* 468 F. Supp. 586 (S. D. N.Y. 1979), *aff'd* 614 F.2d 1288 (2nd Cir. 1979); *White v. South Park Independent School District,* 693 F.2d 1163 (5th Cir. 1982); and *Harbulak v. County of Suffolk,* 654 F.2d 194 (2nd Cir. 1981).

Equally untenable is the claim of the Taxpayers that lay persons may not be ordered to pay attorney's fees under § 1988 for instituting a frivolous lawsuit. The language of § 1988 conspicuously lacks any such prohibition. Furthermore, this Court applied § 1988 to

a lay defendant in *Hughes,* 449 U.S. 5 (award of attorneys' fees against pro se plaintiff not proper where his § 1983 action was not "frivolous" within the meaning of *Christiansburg Garment Co.,* 434 U.S. 412), and accordingly, so have the lower federal courts. *See, e.g., Goff v. Texas Instruments, Inc.,* 429 F. Supp. 973 (N.D. Tex. 1977) (lay plaintiff represented by counsel is liable for attorney's fees of defendant under § 1988 where suit was frivolous); *Werch,* 673 F.2d 192 (plaintiff liable for attorney's fees of defendant city under § 1988 where § 1341 barred suit for injunctive relief and § 1983 claim was meritless); *Kane,* 468 F. Supp. 586, *aff'd,* 614 F.2d 1288 (pro se plaintiff liable for attorney's fees under § 1988); and *Moss v. Ward,* 434 F. Supp. 69 (S.D. N.Y. 1977) (pro se plaintiff in frivolous § 1983 suit is liable for attorney's fees under § 1988).

The District Court properly applied the standards of *Christiansburg Garment Co.* in determining that the Taxpayers' suit in the case at bar is frivolous, and the Court did not abuse its discretion to award attorneys' fees to the defendants under § 1988. Such award to the Defendants is clearly authorized by the express provisions of § 1988 and the cases of this Court construing the same.

## IV. 42 U.S.C. § 1988 IS CLEARLY CONSTITUTIONAL AS APPLIED BY THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THIS CASE.

This Court has recognized the critical importance of deterring frivolous and vexatious civil rights actions by requiring plaintiffs to pay the attorneys' fees and costs of the defendants subjected to such actions. *Christiansburg Garment Co.,* 434 U.S. at 420. Nevertheless, the Taxpayers in the instant case claim that requiring them to pay the Defendants' reasonable

attorneys' fees incurred as a result of the Taxpayers' frivolous suit would be unconstitutional. The several theories which the Taxpayers present to support such a contention are without merit.

First, the Taxpayers claim that the award of attorneys' fees in the instant case has denied them their First Amendment right to petition the government for redress of grievances, and that the state must bear the costs of defending against frivolous suits "as a necessary and proper operating expense of maintaining a society free of arbitrary and tyrannical oppression". Petition at p. 29-31. Conspicuously lacking in the Petition is any legal authority for such a claim, for indeed, none exists. There is "no constitutional right to access to the courts to prosecute actions that are frivolous and malicious, or even wanton". *Moss,* 434 F. Supp. at 72. Governmental defendants must be entitled to recover attorney's fees under § 1988 in order to deter frivolous lawsuits and avoid the wasting of Taxpayers' money.

The Taxpayers also argue that the rulings of the lower courts in the instant case are constitutionally infirm under *Erie Railway Co. v. Thompkins,* 304 U.S. 64 (1938), apparently under the erroneous belief that the availability of an award of attorney's fees under § 1988 has to be determined by reference to Virginia law. As *Christiansburg Garment Co.* and progeny clearly indicate, § 1988 is of critical importance in protecting federal civil rights and the availability of attorney's fees thereunder is not dependent upon whether such would be available under the law of any state.

An equally frivolous argument asserted by the Taxpayers is that *Pulliam v. Allen,* ____ U.S. ____, 104 S. Ct. 1970 (1984), "by necessary implication . . . has overruled the judgment of the District Court and

the Appeals Court judgment that appellants [sic] are legally and justly obligated to pay the state's attorney fees ordered by the District Court''. Petition at 33. *Pulliam* holds that the common law doctrine of judicial immunity does not bar an award of attorney's fees under § 1988 to one who succeeds in obtaining injunctive relief against a state judicial officer under § 1983. The relevance of *Pulliam* to the case at bar escapes us.

In conclusion, attorneys' fees were awarded against the plaintiff Taxpayers under § 1988 only after the District Court had concluded that their claims were frivolous, unreasonable and meritless within the meaning of *Christiansburg Garment Co.,* and that they had continued to litigate their claims after the frivolousness of such became apparent. The Taxpayers have no constitutional right to institute and persist in litigating frivolous suits in federal court against the Franklin County Board of Supervisors and the Town of Rocky Mount. Furthermore, no constitutional right of the Taxpayers was infringed by the award of attorneys' fees in the instant case. The application of the strict standard of *Christiansburg Garment Co.* in assessing attorneys' fees against civil rights plaintiffs under § 1988 ensures that such plaintiffs will not be deterred from instituting meritorious civil rights for fear of an award of attorney fees against them.

## CONCLUSION

In light of the fact that each of the issues raised by the Petitioners have been adequately addressed in the previous decisions of this Court, which were correctly applied by the lower courts herein, the Respondent Board of Supervisors of Franklin County, Virginia

respectfully requests that the Court decline to grant a writ of *certiorari* in this case.

Respectfully submitted,

William R. Rakes
GENTRY, LOCKE, RAKES & MOORE
P. O. Box 1018
Roanoke, Virginia 24005

OF COUNSEL:
John M. Huddle
GENTRY, LOCKE, RAKES & MOORE
P. O. Box 1018
Roanoke, Virginia 24005

Bruce F. Welch
WELCH & JEFFERSON
126 S. Main Street
Rocky Mount, VA 24151

Counsel for Respondent,
Board of Supervisors of Franklin County, Virginia

(3)

84-1057

Office Supreme Court, U.S.
FILED
JAN 30 1985
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1984

OPHUS A. HUTCHERSON, JR.
W. H. HOUSEMAN
A. W. LYNCH
BRUCE HIGGINS
O. K. TENCH
KENNETH D. CAMPBELL
ALLEN PERDUE
JAMES BOUSEMAN
JACKSON JEWELL
J. CARL POINDEXTER

and

A. DALE BROWN
RICHARD O. ANGLE
HAROLD E. PALMER
PAUL SMITH
JOSEPH FORDHAM
ROGER FLOWERS
DICK ROBERTSON

Petitioners,

v.

BOARD OF SUPERVISORS OF
FRANLIN COUNTY, VIRGINIA;
TOWN OF ROCKY MOUNT, VIRGINIA

Respondents.

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

G. CARTER GREER
GREER & GREER
110 Maple Avenue
Rocky Mount, Virginia

Of Counsel

T. KEISTER GREER
110 Maple Avenue
Rocky Mount, Virginia

Counsel for Respondent
Town of Rocky Mount,
Virginia

34

## I. QUESTIONS PRESENTED

1. Was the decision of the court below clearly correct?

2. Is there a conflict in the circuits?

## II. TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . . i

TABLE OF CONTENTS . . . . . ii

TABLE OF AUTHORITIES . . . . . iii

SUMMARY OF ARGUMENT . . . . . 1

ARGUMENT . . . . . 3

A. THE DECISION BELOW IS CLEARLY CORRECT . . . . . 3

1. Two recent decisions of this Court, construing the Tax Injunction Act of 1937 [28 U.S.C. §1341], require that this action be dismissed for want of jurisdiction . . . . 3

2. The Rule of Fair Assessment In Real Estate v. McNary, 454 U.S. 100 (1981), also requires that this case be dismissed . . . 8

3. The statutory remedy provided by former §58-1145 of the Code of Virginia is a plain, speedy, and efficient remedy . . . . 10

4. The plaintiffs' action is frivolous, unreasonable, and without foundation . . . 15

B. THERE IS NO CONFLICT OF DECISION WITHIN THE CIRCUITS . . . . . 22

CONCLUSION . . . . . 27

## III. TABLE OF AUTHORITIES


| CASE | PAGE |
|---|---|
| Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301 (5th Cir. 1980) . . . . . | 24, 25 |
| Ayers v. Polk County, Georgia, 697 F.2d 1375 (11th Cir. 1983) . . . | 26 |
| Bland v. McHann, 463 F.2d 21 (5th Cir. 1972) . . . . . | 23 |
| California v. Grace Brethren Church, 457 U.S. 393, 73 L.Ed.2d 93 (1982) . . . . . | 2, 4, 5, 6, 17, 22 25, 26 |
| Chesapeake & Potomac Telephone Company v. City of Newport News, 194 Va. 409, 73 S.E.2d 394 (1952) . . . . . | 14 |
| Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) . . . . . | 15, 16, 22 |
| Dawson v. Childs, 665 F.2d 705 (5th Cir. 1982) . . . . . | 25 |
| Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981) . . . . | 2, 7, 8, 9, 10, 18 20, 21, 22, 25, 26, 27 |
| Fulton Market Cold Storage v. Cullerton, 582 F.2d 1071 (7th Cir. 1978) | 10 |

Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969) . . . . . 24, 25, 27

Hawaiian Telephone Company v. State Department of Labor, 691 F.2d 905 (9th Cir. 1982) . . . . . 26

Hutcherson, et al. v. Board of Supervisors, et al., 742 F.2d 142 (4th Cir. 1984) . . . . . 18, 19, 20

Moten v. Lambert, 508 F.Supp. 367 (N.D. Miss 1981) . . . . . 22, 23, 24, 25, 26

Northwood Apartments v. La Valley, 673 F.2d 159 (6th Cir. 1982) . . . . . 26

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) . . . . . 1, 6, 12 16, 17, 25

Trescon Industries, Inc. v. Cohen, 664 F.2d 929 (4th Cir. 1981). . 12

Todd v. County of Elizabeth City, 191 Va. 52, 60 S.E.2d 23 (1950) . . . 14, 17

Tully v. Griffin, Inc., 429 U.S. 68 (1976) . . . . . 12

Werch v. City of Berlin, 673 F.2d 192 (7th Cir. 1982) . . . . . 20, 21

## STATUTES

28 U.S.C. §1341 . . . . . 1, 3, 4, 6, 7, 11

42 U.S.C. §1983 . . . . . 1, 8, 10
18, 20,
21

42 U.S.C. §2000a . . . . . 15

Code of Virginia §58-617.2 . . . . . 1, 15,
17, 22,
26

Code of Virginia §58-1145 . . . . . 10, 11,
13, 14,
17

Code of Virginia §58.1-3984 . . . . . 11, 17

## IV. SUMMARY OF ARGUMENT

Plaintiffs filed their case in the United Stated District Court for the Western District of Virginia in May 1982 and amended their complaint in July 1982; the amended complaint asked for a declaratory judgment that former §58-617.2 of the Code of Virginia was unconstitutional and an injunction ordering the defendant County Board of Supervisors to extend the County's utility tax to the citizens of the defendant Town. In addition, the amended complaint asked for both compensatory and punitive damages pursuant to 42 U.S.C. §1983.

The Tax Injunction Act of 1937, 28 U.S.C. §1341, and the decisions of this Court interpreting this act, make it clear that a federal district court may not entertain the plaintiffs' action. In Rosewell v. LaSalle National Bank, infra, this court held that the "plain, speedy and efficient" remedy of the

statute means that the state court remedy must meet certain procedural criteria. The state court remedy must provide the plaintiffs a forum in which to present their constitutional arguments against the disputed tax. Virginia has such a statute, and under this statute all of the plaintiffs' constitutional arguments may be fully expounded.

Well over a month before plaintiffs filed their amended complaint, this court decided California v. Grace Brethren Church, infra, in which the Court held that the Tax Injunction Act barred federal jurisdiction of suits asking for declaratory relief, as well as injunctive relief, against state tax laws. In Fair Assessment in Real Estate v. McNary, infra, this Court held that the principle of comity prevented a district court from exercising jurisdiction over a §1983 action challenging the validity of a state tax system.

In spite of the decisions of this court, plaintiffs filed their suit in federal court.

The decisions of both the district court and the United States Court of Appeals for the Fourth Circuit were correct, since the district court could not entertain plaintiffs' action. Plaintiffs have continued to litigate this matter, although it is frivolous, unreasonable, and without foundation.

## V. ARGUMENT

### A. THE DECISION BELOW IS CLEARLY CORRECT.

1. Two recent decisions of this Court, construing the Tax Injunction Act of 1937 [28 U.S.C. §1341], require that this action be dismissed for want of jurisdiction.

The Tax Injunction Act of 1937 [28 U.S.C. §1341] states as follows:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain,

speedy and efficient remedy may be had in the courts of such State."

On June 18, 1982, just eight days after defendant Town of Rocky Mount filed its motion to dismiss, this Court decided California v. Grace Brethren Church, 457 U.S. 393, 73 L.Ed.2d 93 (1982), which held as follows:

"The Tax Injunction Act states simply that the district courts 'shall not enjoin, suspend or restrain the ... collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.' It is plain from this language that the Tax Injunction Act prohibits a federal district court, in most circumstances, from issuing an injunction enjoining the collection of state taxes. Although this Court once reserved the question, we now conclude that the Act also prohibits

> a district court from issuing a declaratory judgment holding state tax laws unconstitutional." Grace Brethren Church, supra, 73 L.Ed.2d at 106; emphasis added.

Plaintiffs thus seek to do what is expressly prohibited. They seek an injunction to compel the collection of a state tax, and a declaratory judgment holding a state tax law to be unconstitutional. The amended complaint prays

> "[t]hat the Court determine and declare that the exemption of the town's citizens and school patrons from the legal responsibility to pay the county's school-supporting utility tax on the same basis as is required of plaintiffs' class of county citizens, as provided in Section 58-617.2 of the Virginia Code, makes that provision of the state statute unconstitutional...."

In Grace Brethren Church, supra, the Court relied heavily on Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981), a case in which this Court considered the meaning of the words "plain, speedy and efficient" in the Tax Injunction Act. The Court also discussed the purpose of the Tax Injunction Act as follows:

> "The statute 'has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations.' Tully v. Griffin, Inc., supra, at 73. This last consideration was the principal motivating force behind the Act: this legislation was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local

concern as the collection of taxes." Rosewell, supra at 522; emphasis added.

Plaintiffs suggest that the justification for limiting federal interference into matters involving questions of state tax law is to prevent disruption of the flow of state tax revenues into a state's treasury, and that since they are seeking to compel the citizens of the defendant Town to pay Franklin County's utility tax in the same manner as the county citizens, §1341 presents no bar to the exercise of federal jurisdiction. [Petition 11] This reasoning is unsound, for the justification for the act goes beyond a concern over the integrity of state tax revenues. The act rests on principles of equity and comity and reflects a historical reluctance on the part of federal courts to interfere with state tax administration. Fair Assessment in Real Estate v. McNary, infra.

2. The Rule of Fair Assessment In Real Estate v. McNary, 454 U.S. 100 (1981), also requires that this case be dismissed.

In the case at bar plaintiffs have brought their action under 42 U.S.C. §1983. Paragraph 1 of the amended complaint states as follows:

> "This action arises under the Constitution and laws of the United States, viz., Amendment Fourteen, Section 1, and 28 U.S.C. 1331, 2201, and 42 U.S.C. 1983, and is brought as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure."

Plaintiffs are also seeking damages. The amended complaint asks that the court order:

> "[t]hat the Defendants shall pay to each member of Plaintiffs' class a sum in damages equal to the

> difference between the utility taxes each has paid and those each would habe [sic] paid had the county's utility tax been collected heretofore and henceforth also from the town's inhabitants...."

The amended complaint also asks the court to order that "the County Board of Supervisors shall pay punitive damages to each member of Plaintiffs' class in the additional amount of 100% of the actual damages aforesaid; as authorized by 42 U.S.C. 1983, for violations of the civil rights of the Plaintiffs...."

On December 1, 1981, this Court decided Fair Assessment in Real Estate v. McNary, supra, which disposes of the plaintiffs' damage claims:

> "...[t]he Tax Injunction Act and our comity cases have thus far barred federal courts from granting injunctive and declaratory relief in state tax cases.

> Because we decide today that the principle of comity bars federal courts from granting damages relief in such cases, we do not decide whether the Act, standing alone, would require such a result." McNary, supra, 70 L.Ed. at 277, 278; emphasis added.

The Court in McNary held "that taxpayers are barred by the principle of comity from asserting §1983 actions against the validity of state tax systems in federal courts." McNary, supra, 70 L.Ed. at 283. Fulton Market Cold Storage v. Cullerton, 582 F.2d 1071 (7th Cir. 1978), cited by the plaintiffs for the proposition that 42 U.S.C. §1983 requires that their complaint be heard on the merits, is no longer good law in the wake of McNary.

3. The statutory remedy provided by former §58-1145 of the Code of Virginia is a

plain, speedy, and efficient remedy.[1]

The Tax Injunction Act [28 U.S.C. §1341] essentially commands the federal courts not to assume jurisdiction of cases in which the resolution may depend upon an interpretation of

---

[1] Former section 58-1145 has been repealed and replaced by section 58.1-3984 of the Code of Virginia, effective January 1, 1985, which reads in part as follows:

> "Any person assessed with local taxes, aggrieved by any such assessment, may, unless otherwise specially provided by law, within three years from the last day of the tax year for which any such assessment is made, apply for relief to the circuit court of the county or city wherein such assessment was made. The application shall be before the court when it is filed in the clerk's office. In such proceeding the burden of proof shall be upon the taxpayer to show that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application, or that the assessment is otherwise invalid or illegal, but it shall not be necessary for the taxpayer to show that intentional, systematic and wilful discrimination has been made. The proceedings shall be conducted as an action at law before the court, sitting without a jury. The county or city attorney, or if none, the Commonwealth's attorney, shall defend the application"

It is thought that case law decided under the old statute is still applicable.

state tax law "where a plain, speedy and efficient remedy may be had in the courts of such State". If there is no "plain, speedy and efficient" remedy available in the state courts, then, and only then, may the federal courts assume jurisdiction over state tax cases. Strescon Industries, Inc. v. Cohen, 644 F.2d 929 (4th Cir. 1981).

This Court in Rosewell, supra, discussed the meaning of the "plain, speedy and efficient remedy" exception and concluded that this exception "appears to require a state court remedy that meets certain minimal procedural criteria". Rosewell, supra, at 512; emphasis in original. Examining the treatment accorded the exception to §1341, the Rosewell Court looked at Tully v. Griffin, Inc., 429 U.S. 68 (1976), in which the Court described the general meaning of the exception as an inquiry into whether state law provided a "plain, speedy and efficient" way for the taxpayer to argue constitutional claims while at the same time reserving the right to challenge the

amount of tax due.

Former section 58-1145 of the Code of Virginia was the statutory remedy for aggrieved taxpayers at the time of the filing of this suit, and it is in part as follows:

> "Any person assessed with county or city levies or other local taxes, aggrieved by any such assessment, may, unless otherwise specially provided by law, within three years from the last day of the tax year for which any such assessment is made, apply for relief to the circuit court of the county or any city court of record of the city wherein such assessment was made. In such proceeding the burden of proof shall be upon the taxpayer to show that the property in question is assessed at more than its fair market value or that the assessment is not uniform in its application, or that

> the assessment is otherwise invalid or illegal, but it shall not be necessary for the taxpayer to show that intentional, systematic and wilful discrimination has been made...."[Emphasis added]

Under former §58-1145 all of the plaintiffs' constitutional claims could be fully expounded. Todd v. County of Elizabeth City, 191 Va. 52, 60 S.E.2d 23 (1950). In Chesapeake & Potomac Telephone Company v. City of Newport News, 194 Va. 409, 73 S.E.2d 394 (1952), the Supreme Court of Virginia stated as follows:

> "Relief under these statutes is not confined to the correction of an assessment which is merely erroneous. They embrace also levies and assessments claimed to be unconstitutional, illegal and void." City of Newport News, supra at 413; emphasis added.

Using this statute, plaintiffs could have challenged the constitutionality of §58-617.2 of the Code of Virginia in the Circuit Court of Franklin County, Virginia, but they chose not to do so.

4. The plaintiffs' action is frivolous, unreasonable, and without foundation.

In Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), the Supreme Court enunciated the standard to be applied involving Title VII of the 1964 Civil Rights Act [42 U.S.C. §2000a, et seq.]:

> "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Christiansburg Garment Co., supra at 421; emphasis added.

This Court thus made it clear that bad faith is not a necessary ingredient in awarding counsel fees.

The only remaining inquiry is whether plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith". Christiansburg Garment, supra at 421. The following considerations bear upon this issue:

1. The suit prayed for injunctive relief on an issue of state taxation, and that relief has been barred by the Tax Injunction Act, 28 U.S.C. §1341, since 1937.

2. Plaintiffs' case was filed on May 25, 1982. Over a year earlier, on March 24, 1981, the Supreme Court in Rosewell v. LaSalle National Bank, supra, had expressly stated that:

> "[t]he Tax Injunction Act embodied Congress' decision to transfer jurisdiction over a class of

> substantive federal claims from the federal district courts to the state courts, as long as state court procedures were 'plain, speedy and efficient' and final review of the substantive federal claim could be obtained in this Court." Rosewell, supra at 515.

3. Virginia has had throughout the litigation a "plain, speedy, and efficient" remedy under §58-1145 of the Code of Virginia, the predecessor to present §58.1-3984 of the Code of Virginia, and under the statute all of plaintiffs' constitutional claims may be fully expounded. Todd v. County of Elizabeth City, 191 Va. 52, 60 S.E.2d 23 (1950).

4. In Grace Brethren Church, supra, decided on June 6, 1982, which was well over one month before plaintiffs filed their amended complaint seeking to invalidate as unconstitutional former §58-617.2 of the Code of Virginia, this Court ruled that such

declaratory and injunctive relief was barred by the Tax Injunction Act, 28 U.S.C. §1341.

5. Finally, in McNary, supra, decided on December 1, 1981, which was well over seven months before plaintiffs filed their amended complaint asking for damages, this Court made it clear that a suit for damages under 42 U.S.C. §1983, challenging the validity of state tax systems, would not lie in federal court on the grounds of comity.

The Court below said as follows:

> "When plaintiffs initiated this action, the law was settled both by statute and decision that a federal court could not entertain such a suit for injunctive relief unless no plain, speedy and efficient state court remedy existed. McNary precluded a suit for damages. Any doubt that an action for discretionary declaratory relief

could be maintained after Great Lakes Dredge & Dock Co. v. Hoffman, 319 U.S 393 (1943), was dispelled one month after the complaint was filed in this case by the Supreme Court in Grace Brethren Church which decided that declaratory relief was simply not available because of 28 U.S.C. §1341. Following that decision, however, the plaintiffs amended their complaint to ask for more, rather than less, declaratory relief. And so the case was when it came on for hearing.

"In light of the settled principles of law existing before the filing of this action and handed down during the action, all before the hearing in the district court, we conclude that plaintiffs' suit is meritless within the meaning of Christiansburg Garment Co., in that it is unreasonable or groundless and that the plaintiffs continued to

litigate after it clearly became so. Christiansburg Garment, Co., at 422." Hutcherson, et al. v. Board of Supervisors of Franklin County, et al., 742 F.2d 142, 146 (4th Cir. 1984).

In Werch v. City of Berlin, 673 F.2d 192 (7th Cir. 1982), plaintiff filed a §1983 action against the City of Berlin, Wisconsin, and many town officials, including the city tax assessor. Werch alleged that defendants had denied him equal protection of the laws under the Fourteenth Amendment by levying personal property taxes on his corn combines when other similarly situated residents of the City of Berlin were not so taxed. The District Court granted defendants' motions to dismiss and awarded attorney's fees, and the Seventh Circuit affirmed. The District Court made these rulings in May and July of 1981, and arguments on appeal were heard before the Seventh Circuit in February, 1982. During the interim the Supreme Court decided McNary, supra. The decision of plaintiff Werch to

proceed with his appeal in the face of McNary impressed the Seventh Circuit in Werch that the plaintiff's case was indeed frivolous. The Court stated as follows:

> "If we were to assume--which we do not--that there were any grounds for urging reversal of the district court's dismissal of Werch's complaint and assessment of attorney's fees when Werch filed his notice of appeal, those grounds were certainly abrogated by the Supreme Court's intervening decision in Fair Assessment In Real Estate Assoc., Inc. v. McNary, ___ U.S. ___, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981). Werch continued to litigate this appeal after it clearly became frivolous, unreasonable, and groundless." Werch, supra at 196.

The plaintiffs filed a §1983 action, including a claim for damages, against the

validity of former §58-617.2 of the Code of Virginia exempting the Town of Rocky Mount from Franklin County's utility tax. To file such a suit on May 25, 1982, in the face of this Court's decision in McNary the previous December 1st, and to press forward with the suit in the face of this Court's decision in Grace Brethren Church in June 1982, can be described only as "frivolous, unreasonable, or without foundation", within the meaning of Christiansburg Garment, supra.

B. THERE IS NO CONFLICT OF DECISION WITHIN THE CIRCUITS.

Plaintiffs quote the following paragraph from Moton v. Lambert, 508 F.Supp. 367 (N.D. Miss 1981) in their petition:

> "It has long been established by the Fifth Circuit, however, that §1341 does not apply to suits wherein the requested remedy is the collection of additional taxes and not the

enjoining or suspension of taxes. See Hargrave v. McKinney, 413 F.2d 320 (5 Cir. 1969); Bland v. McHann, 463 F.2d 21 (5 Cir. 1972); Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301, 1304 (5 Cir. 1980). Since plaintiffs demand that taxes be collected and not enjoined, it is quite clear that §1341 does not operate to bar this action." Moton, supra at 368.

The implication of Moton is that "enjoin" means the same as "restrain", and operates only to forbid an assessment, levy or collection, but "enjoin" also has a well-recognized mandatory meaning. The word is used in precisely this mandatory sense in paragraph six of the prayer of plaintiffs' amended complaint:

"That accordingly the court issue its order enjoining the County Board of Supervisors to extend the

> county's utility tax to and collect it from the inhabitants of the town on the same basis as it applies to the inhabitants of the county at large (Plaintiffs' class)...."

The Court in Moton, supra, relied upon Appling County v. Municipal Electric Authority of Georgia, 621 F.2d 1301 (5th Cir. 1980) and Hargrave v. McKinney, 413 F.2d 320 (5th Cir. 1969). Appling, without discussion, relies upon Hargrave, in which the court made the following statement about §1341:

> "Encroachments on the federal judiciary's power to vindicate rights allegedly guaranteed by the Constitution must be construed narrowly." Hargrave, supra at 326.

The court accordingly held that §1341 did not apply to a suit "to require the collection of taxes." Ibid.

The criteria and predicates of Hargrave, supra, cannot survive McNary, supra, Rosewell, supra, and Grace Brethren Church, supra. Indeed, it is questionable whether Hargrave and Appling, supra, remain authoritative in the Fifth Circuit. The holding of Hargrave that §1341 must be construed narrowly may be contrasted with the following statement in Dawson v. Childs, 665 F.2d 705 (5th Cir. 1982):

> "The concept that section 1341 is not a narrow statute aimed only at injunctive interference with tax collection, but is rather a broad restriction on federal jurisdiction in suits that impede state tax administration, has continued to gain credence in the federal courts." Dawson, supra at 709.

Moton, supra, Appling and Hargrave all were filed as §1983 civil rights actions. Each of these cases antedates this Court's decision in McNary. The following cases are

illustrative of the treatment accorded §1983 actions challenging state tax laws since the McNary decision: Ayers v. Polk County, Georgia, 697 F.2d 1375 (11th Cir. 1983) (judgment of dismissal of §1983 action affirmed on appeal); Hawaiian Telephone Company v. State Department of Labor, 691 F.2d 905 (9th Cir. 1982) (dismissal of §1983 action affirmed on basis of Tax Injunction Act and principle of comity); Northwood Apartments v. La Valley, 673 F.2d 159 (6th Cir. 1982) (judgment of dismissal affirmed on appeal after reconsideration in light of McNary).

In addition, Moton, supra, was decided prior to the decision of this Court in Grace Brethren Church, supra. The decision in Moton did not require the district judge in that case to hold a Mississippi taxing statute unconstitutional, contrary to the case at bar, where the district court was asked to void former §58-617.2 of the Virginia Code. Finally, Moton is the decision of a district

court. Even if it could be maintained that "enjoin" means only the same as "restrain" within the context of the Tax Injunction Act, a conflict in the circuits is not created by the conflicting decisions of a district court and a circuit court. Although Hargrave, supra, may have created a conflict at one time, any suggestion of its soundness was disspelled when this Court decided McNary, supra.

## V. CONCLUSION

The defendant Town of Rocky Mount respectfully requests this Court to deny the writ of certiorari.

G. Carter Greer
GREER & GREER
110 Maple Avenue
Rocky Mount, Virginia

of Counsel

T. Keister Greer
110 Maple Avenue
Rocky Mount, Virginia

Counsel for Respondent
Town of Rocky Mount,
Virginia